

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

No. 18,711

JAMES J. LAUGHLIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 18,712

ALLAN U. FORTE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 10 1964

Nathan J. Paulson

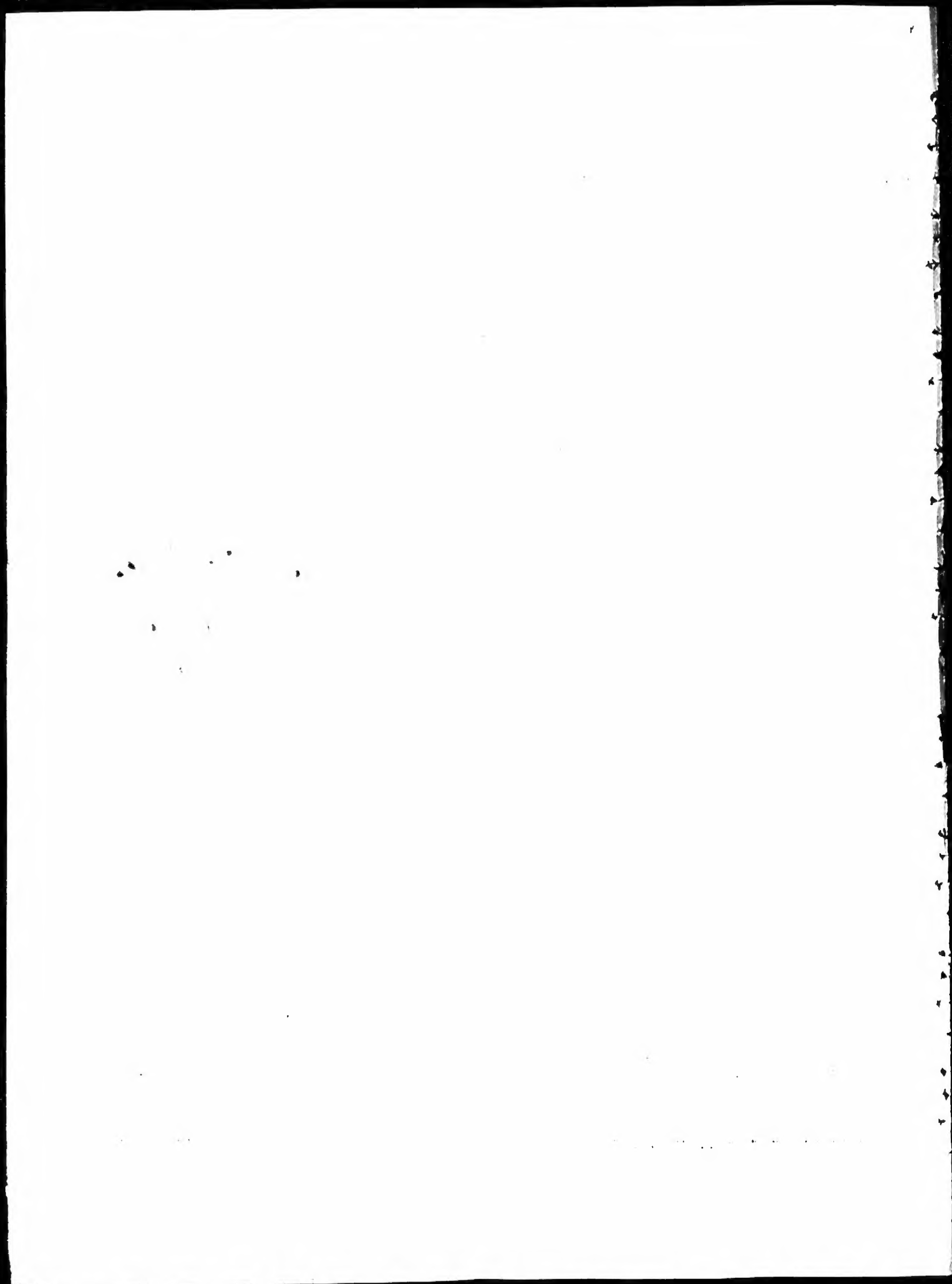
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Of Counsel

William J. Garber
412 Fifth Street, N.W.
Washington 1, D. C.

JAMES J. LAUGHLIN
National Press Building
Washington, D. C.
Counsel for Appellants.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on January 2, 1963

THE UNITED STATES OF AMERICA	:	Criminal Case No. 600-63
v.	:	Grand Jury Original
ALLAN U. FORTE	:	Violations: 18 U.S.C. 371;
JAMES J. LAUGHLIN	:	18 U.S.C. 1503 (Conspiracy;
		Influencing Witness)

Filed July 2, 1963

The Grand Jury charges:

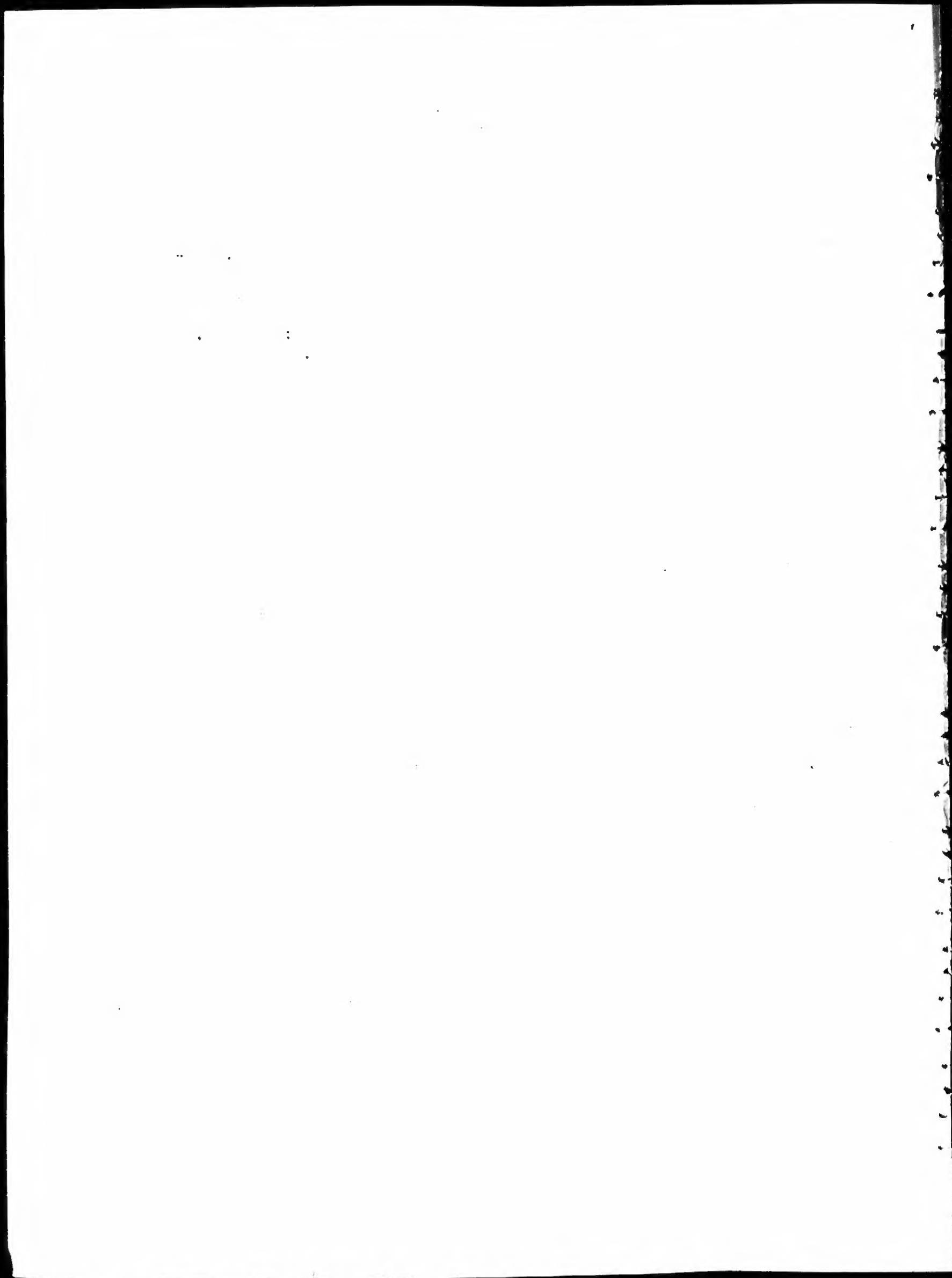
COUNT ONE

1. That a Grand Jury was sworn in on July 5, 1961, in the United States District Court for the District of Columbia and is known and hereinafter referred to as the July 1961 Grand Jury. That on September 11, 1961 Allan U. Forte was indicted by the July 1961 Grand Jury in Criminal Case No. 741-61, United States v. Allan U. Forte, and charged in four counts, each of which charged a violation of the abortion statute of the District of Columbia, Title 22, District of Columbia Code, Section 201.

2. That a petit jury was sworn in on February 12, 1963, in the United States District Court for the District of Columbia for the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, at which trial the defendant Allan U. Forte was represented by counsel James J. Laughlin.

3. That the said Allan U. Forte and the said James J. Laughlin, the defendants indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of the aforesaid indictment would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted

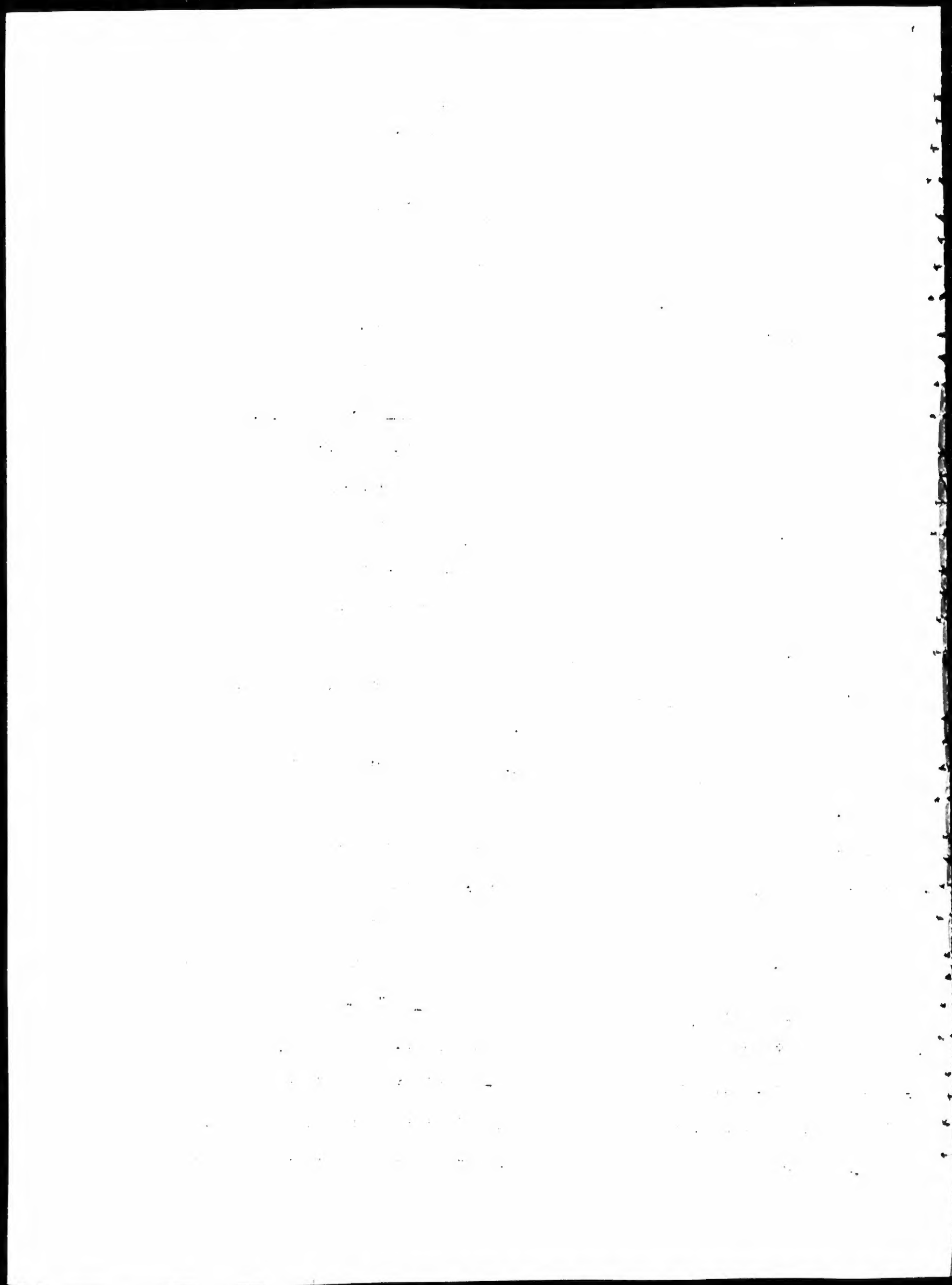


b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and

c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

4. That commencing on or about September 1, 1961, and continuously thereafter until on or about February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, and the States of Maryland and Virginia and at other places unknown to this January 1963 Grand Jury, the said defendants Allan U. Forte and James J. Laughlin did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown to this January 1963 Grand Jury, to defraud the United States and to commit other offenses against the United States, to wit, violations of Title 18, United States Code, Section 1503 (Influencing Witness), Section 1621 (Perjury), and Section 1622 (Subornation of Perjury).

5. That it was part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution



and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

6. That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.

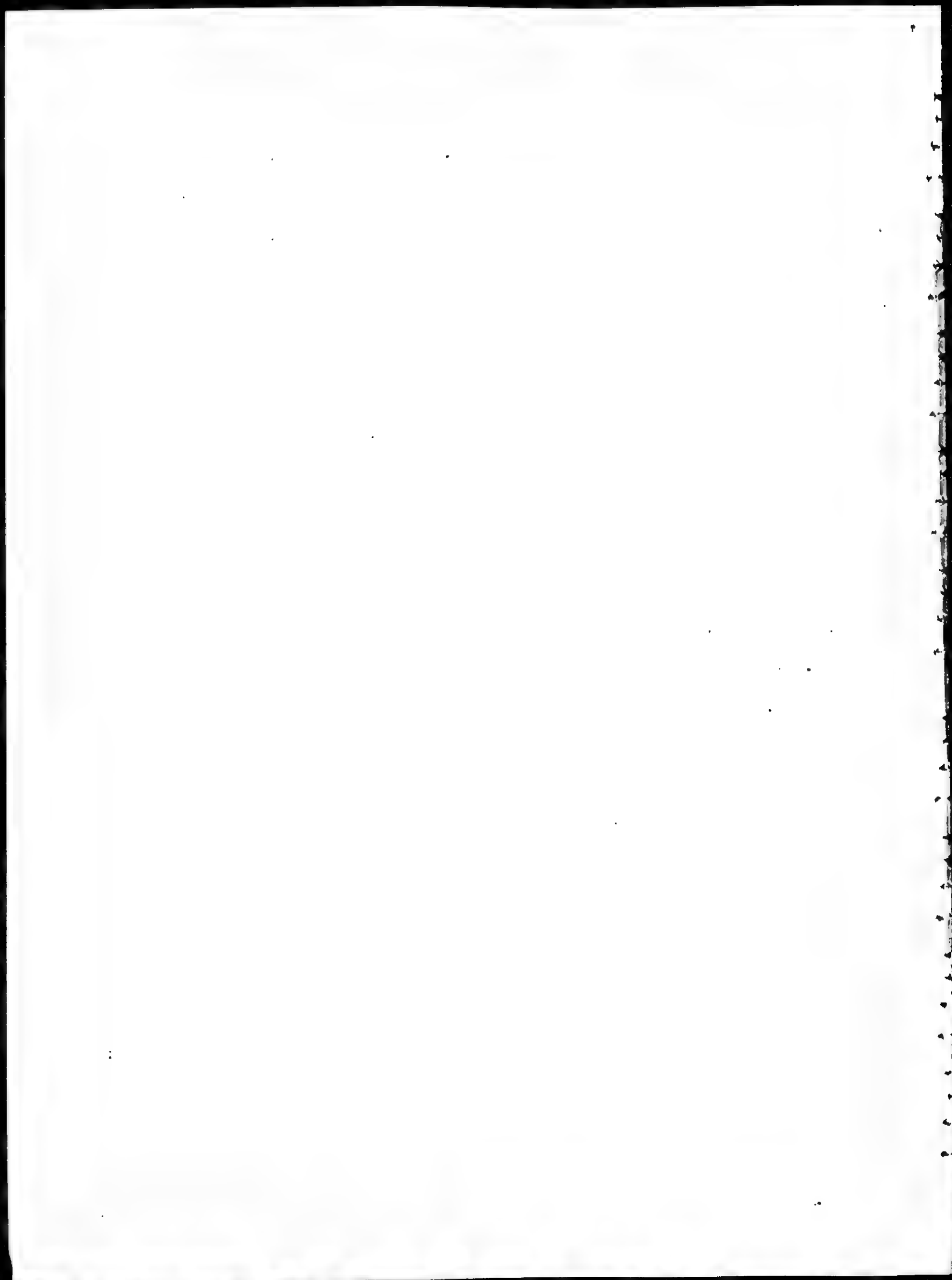
7. That it was also part of the said conspiracy that the said defendants and co-conspirators, would and did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, in the manner and by the means above described.

OVERT ACTS

At the time and places hereinafter mentioned, the said defendants and co-conspirators committed, among others, the following overt acts in furtherance of the said conspiracy and to effect the objects hereinbefore described and alleged:

1. On or about September 1, 1961, the defendant Allan U. Forte engaged in a telephone conversation with Dorothy Lee Birge who was then in Alexandria, Virginia.

2. On or about April 15, 1962, a co-conspirator unknown to the Grand Jury,



engaged in a telephone conversation with Dorothy Lee Birge who was then in Alexandria, Virginia.

3. On or about May 15, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

4. On or about May 20, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

5. On or about May 25, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

6. On or about September 10, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

7. On or about September 13, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

8. On or about September 15, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

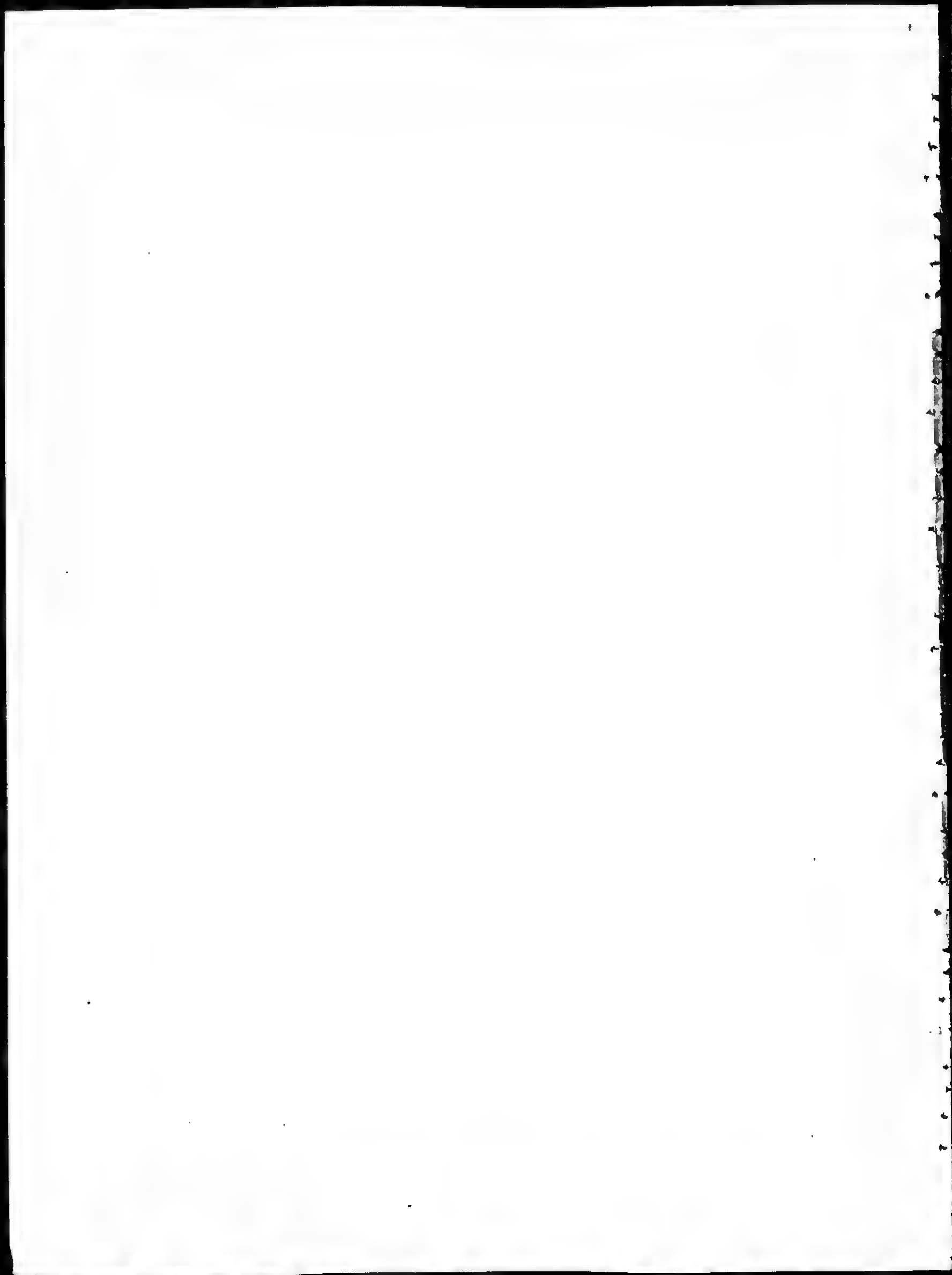
9. On or about September 17, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

10. On or about September 18, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

11. On or about September 20, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

12. On or about October 10, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

13. On or about October 11, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.



14. On or about October 11, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

15. On or about October 13, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

16. On or about October 14, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

17. On or about October 16, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

18. On or about October 16, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

19. On or about October 18, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

20. On or about October 18, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

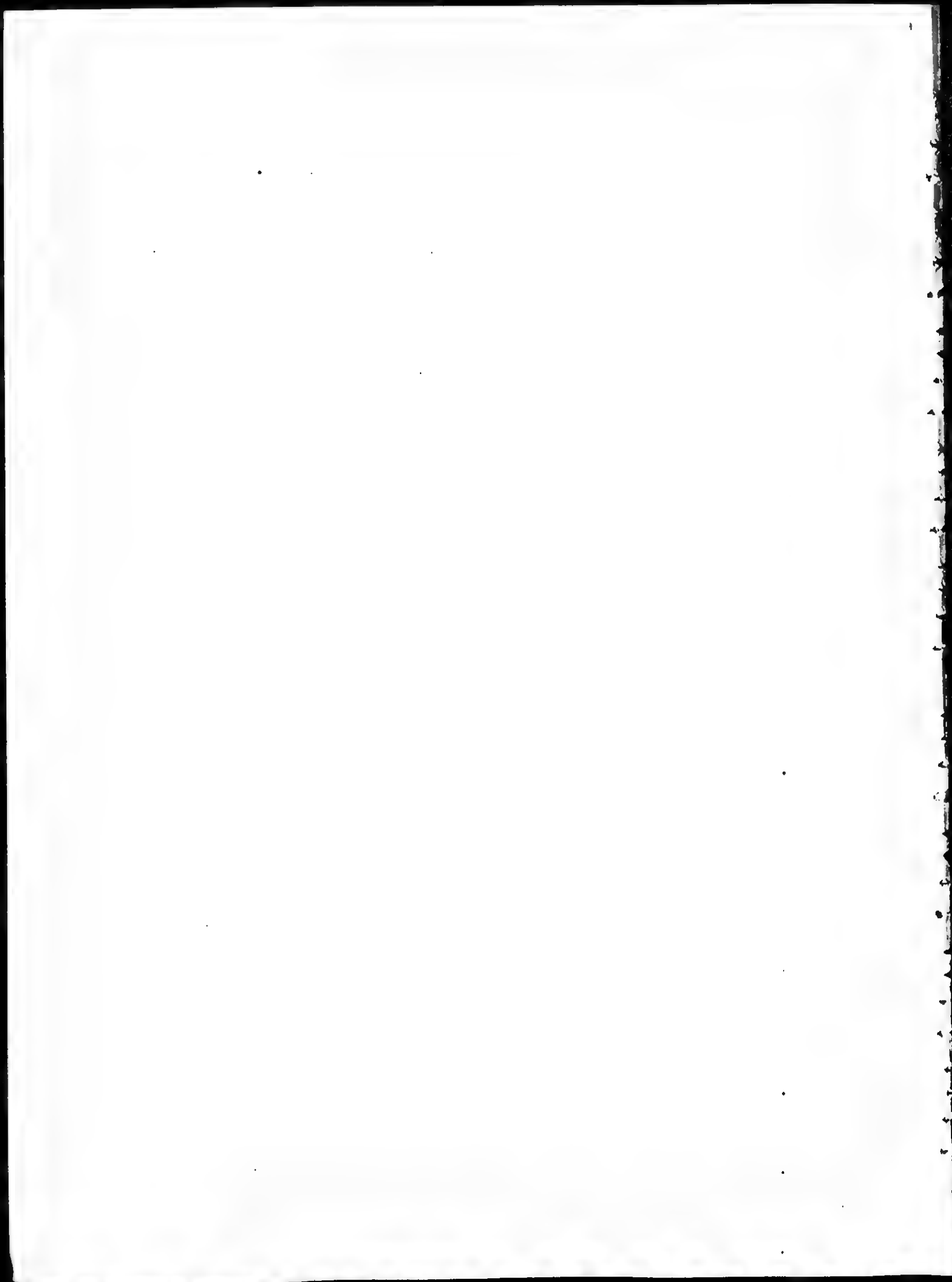
21. On or about October 22, 1962, around mid-day, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

22. On or about October 22, 1962, in the mid-afternoon, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

23. On or about October 22, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

24. On or about October 23, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

25. On or about October 25, 1962, Bernice Gross met Jean Smith in



Baltimore, Maryland.

26. On or about October 26, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

27. On or about October 26, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

28. On or about October 29, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

29. On or about October 29, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

30. On or about November 5, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

31. On or about November 6, 1962, Bernice Gross met Jean Smith in Catonsville, Maryland.

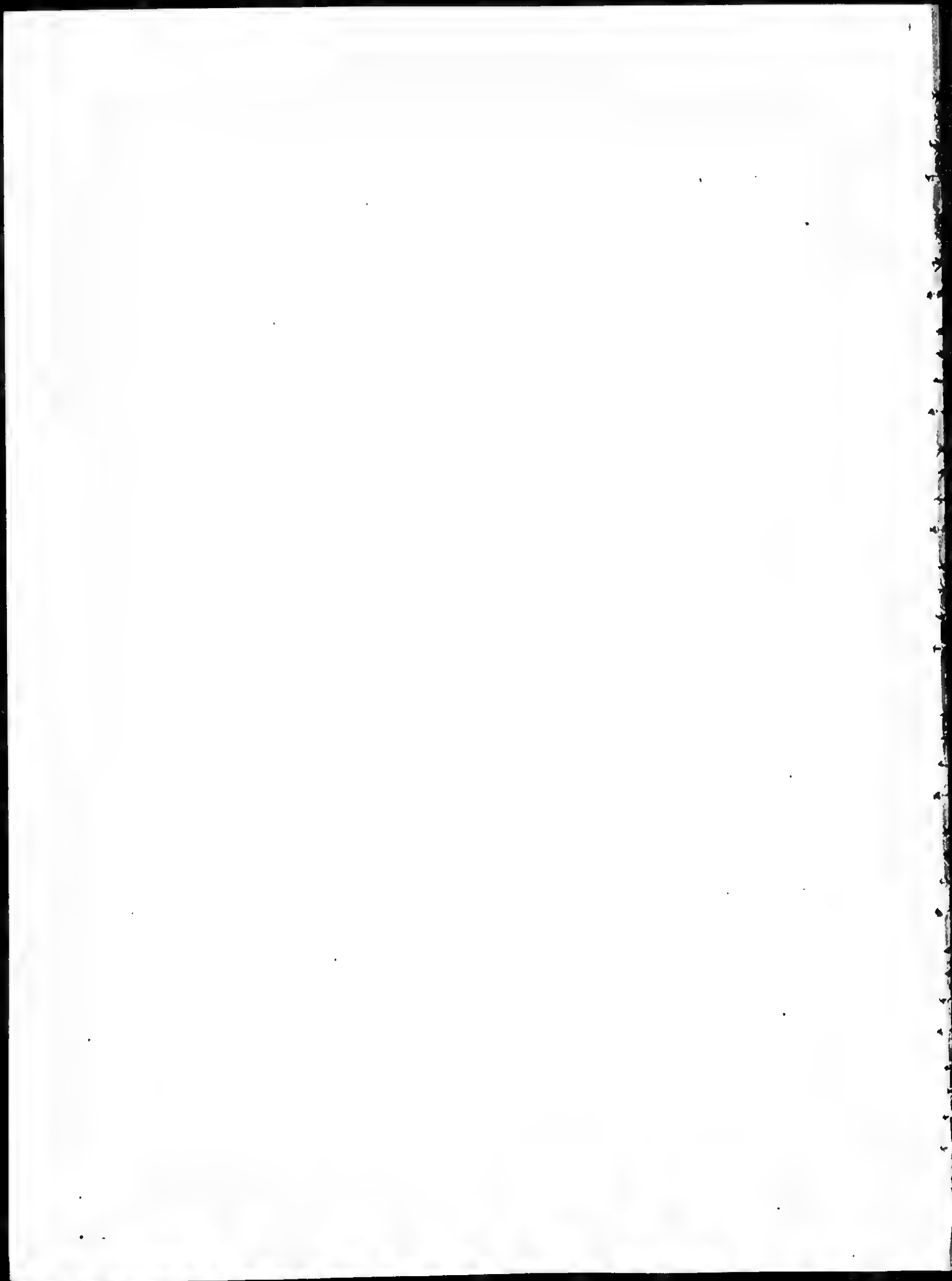
32. On or about November 8, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

33. On or about November 9, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

34. On or about November 9, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

35. On or about November 13, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross.

36. On or about November 13, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.



37. On or about November 18, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

38. On or about November 22, 1962, Bernice Gross met Jean Smith in Baltimore, Maryland.

39. On or about November 27, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

40. On or about December 1, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

41. On or about December 3, 1962, the defendant Allan U. Forte, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

42. On or about December 3, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

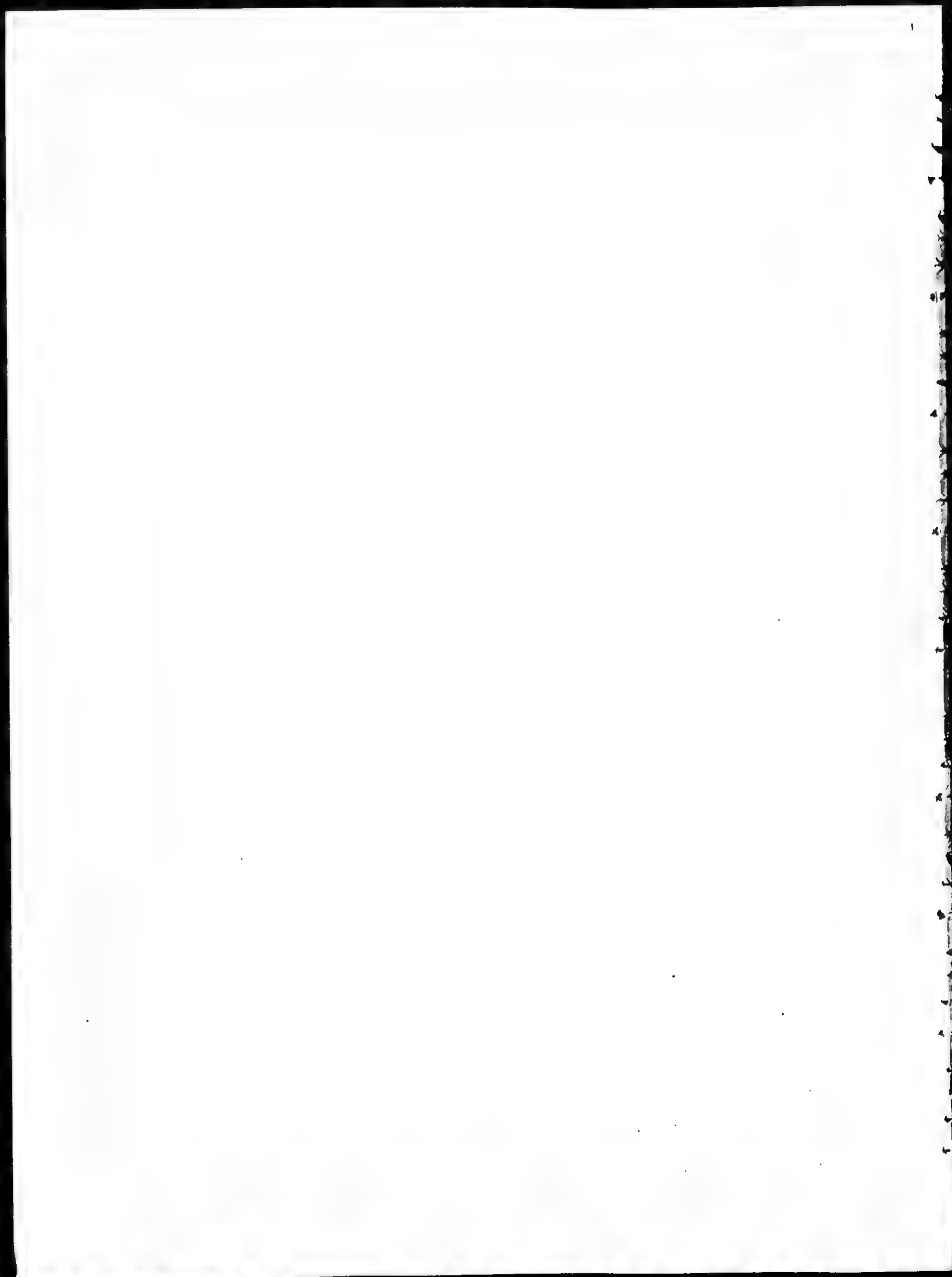
43. On or about December 18, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

44. On or about December 20, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

45. On or about December 22, 1962, Bernice Gross met Jean Smith in Baltimore, Maryland.

46. On or about January 7, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

47. On or about January 10, 1963, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.



48. On or about January 16, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

49. On or about January 16, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

50. On or about January 17, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

51. On or about January 18, 1963, on two separate occasions, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

52. On or about January 18, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

53. On or about January 18, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

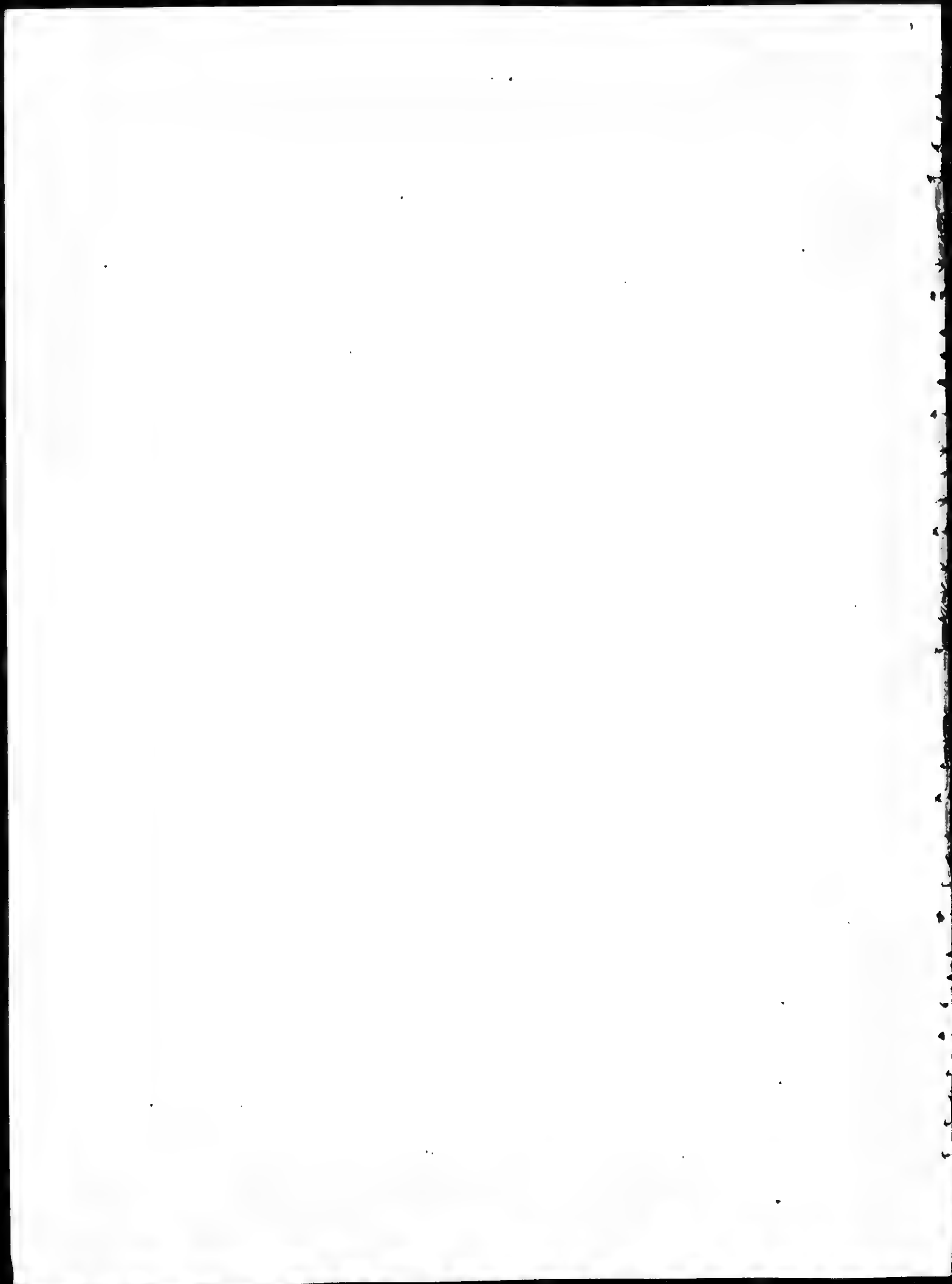
54. On or about January 20, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then in Washington, D. C.

55. On or about January 22, 1963, the defendant James J. Laughlin, who was then in Washington, D. C., engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

56. On or about January 25, 1963, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

57. On or about January 29, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

58. On or about January 31, 1963, Bernice Gross met Jean Smith in



Baltimore, Maryland.

59. On or about February 7, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

60. On or about February 7, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

61. On or about February 11, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

62. On or about February 12, 1963, in the morning hours, the defendant Allan U. Forte, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then in the District of Columbia.

63. On or about February 12, 1963, in the morning hours, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

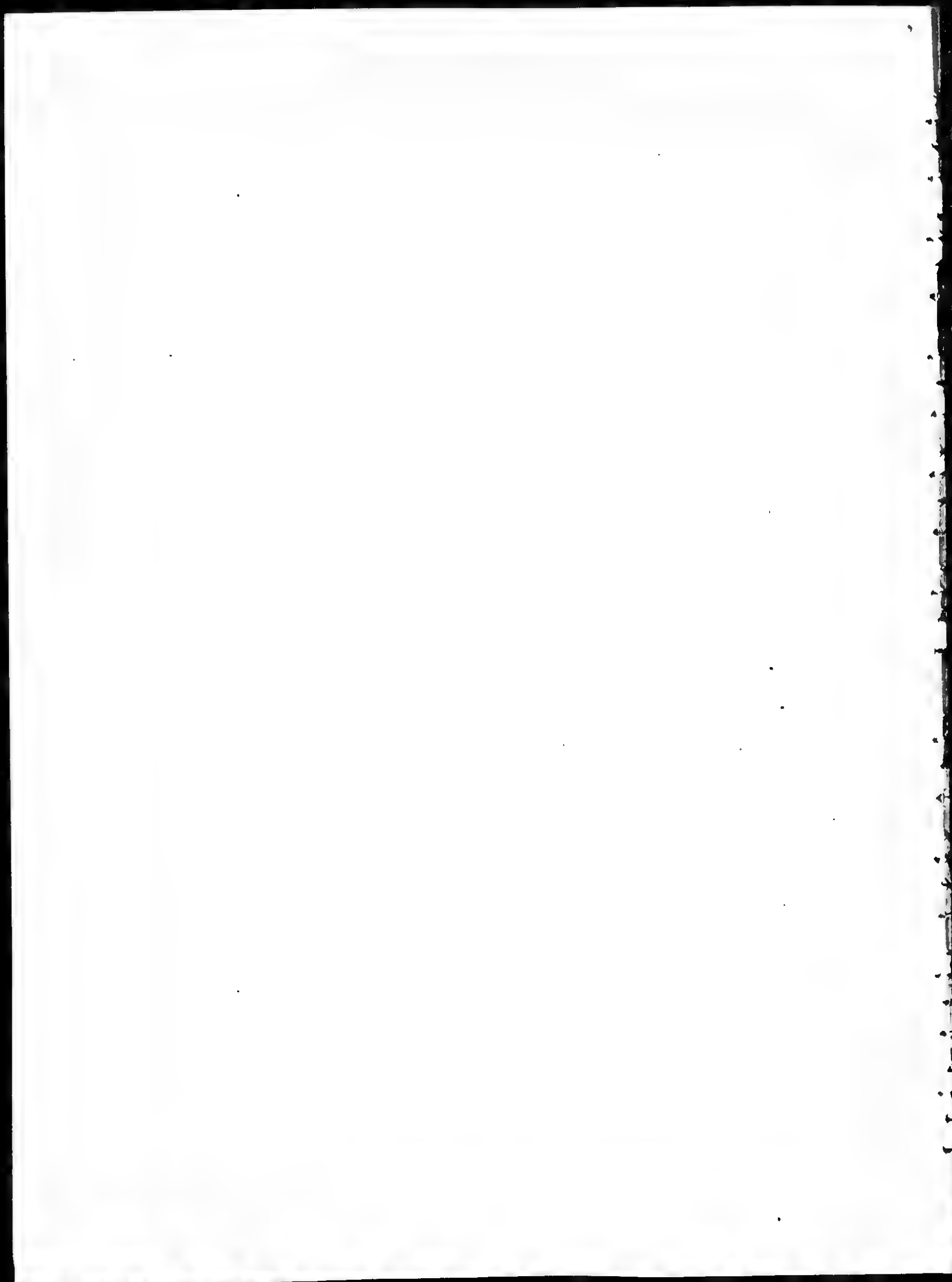
64. On or about February 12, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

65. On or about February 12, 1963, in the afternoon hours, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

66. On or about February 13, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

67. On or about February 14, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

68. On or about February 15, 1963, the defendant Allan U. Forte engaged in



a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

69. On or about February 15, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

70. On or about February 18, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

71. On or about February 19, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

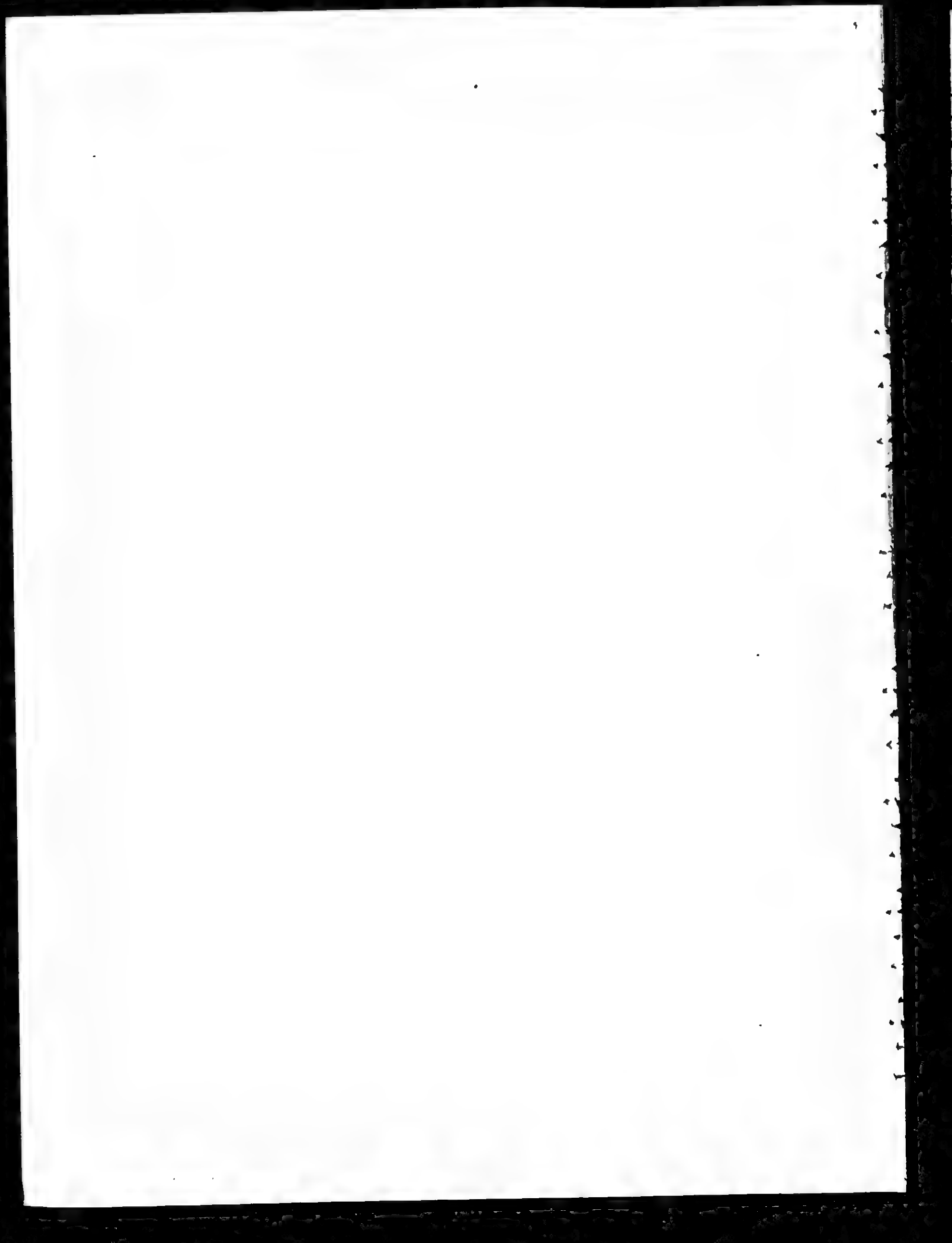
COUNT TWO

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. That the said Allan U. Forte, the defendant indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

3. That from about September 1, 1961 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v.



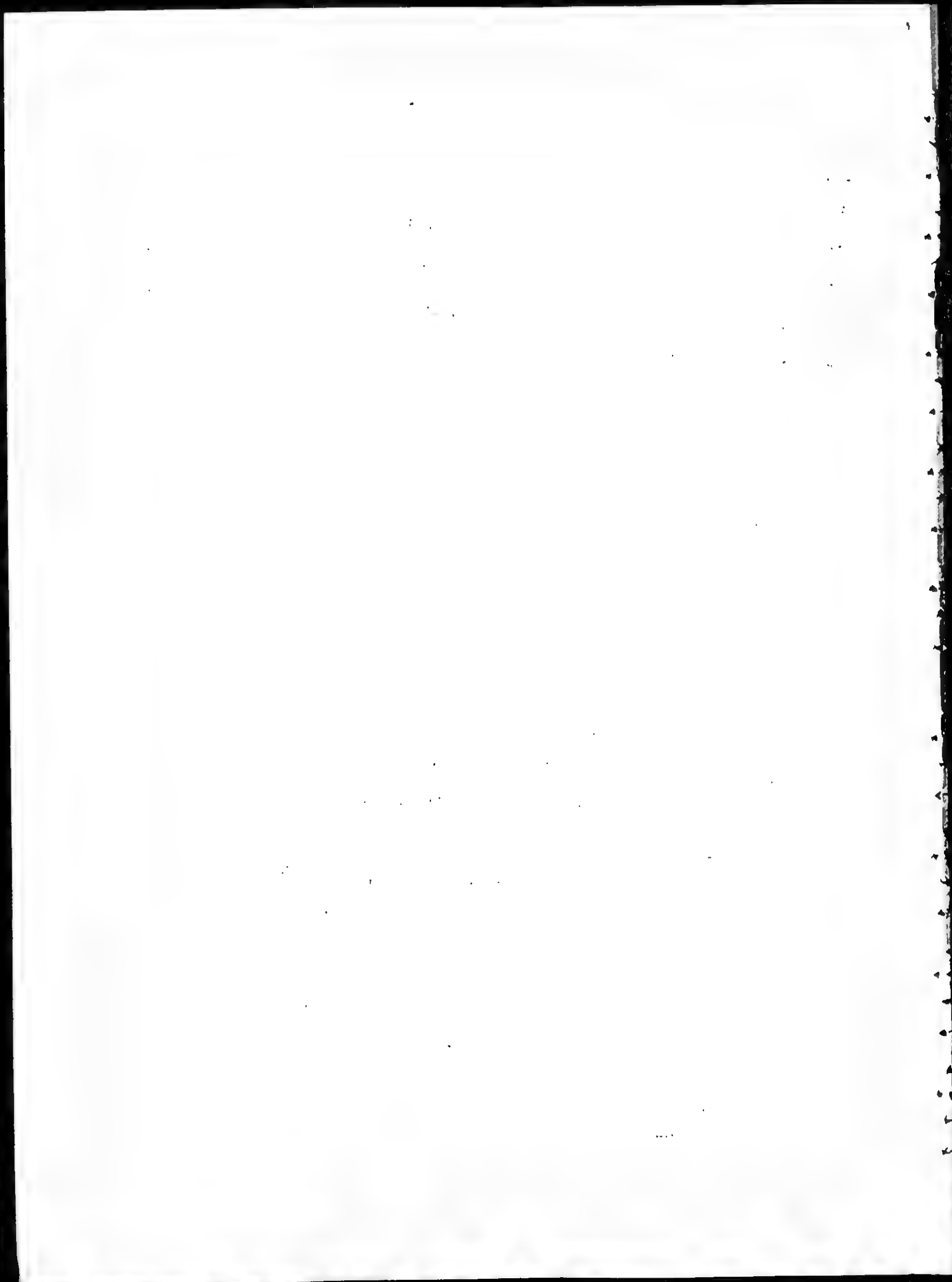
Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant Allan U. Forte, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including subparagraphs a, b, and c thereof, the defendant, Allan U. Forte, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

COUNT THREE

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. Paragraph number two, including subparagraphs a, b, and c, of Count Two of this indictment is by reference incorporated into, and made a part of, this count.

3. That on or about September 1, 1961, the aforesaid Allan U. Forte, the defendant indicted in this count, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, the defendant Allan U. Forte, did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.



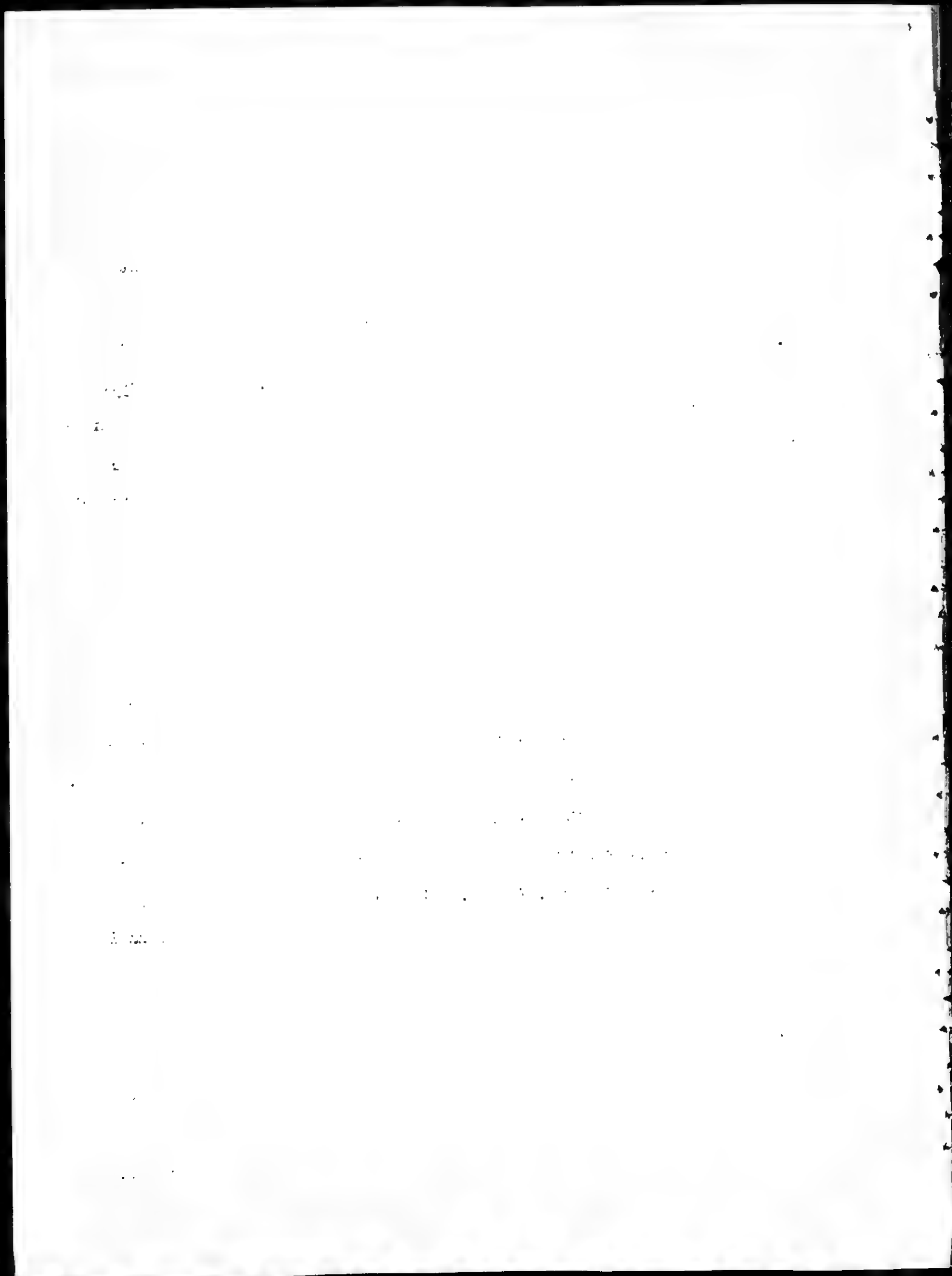
COUNT FOUR

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. That the said James J. Laughlin, the defendant indicted in this count, well knew the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid trial to ascertain:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith and by what means; and
- c. Whether the said Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

3. That from about April 15, 1962 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant James J. Laughlin, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including subparagraphs a, b, and c thereof, the defendant James J. Laughlin, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid



matters at said proceedings and trial.

/s/ David C. Acheson
ATTORNEY OF THE UNITED STATES IN AND
FOR THE DISTRICT OF COLUMBIA

A TRUE BILL

Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

:

v.

:

Criminal No. 600-63

:

Filed April 1, 1964

ALLAN U. FORTE

:

and

JAMES J. LAUGHLIN

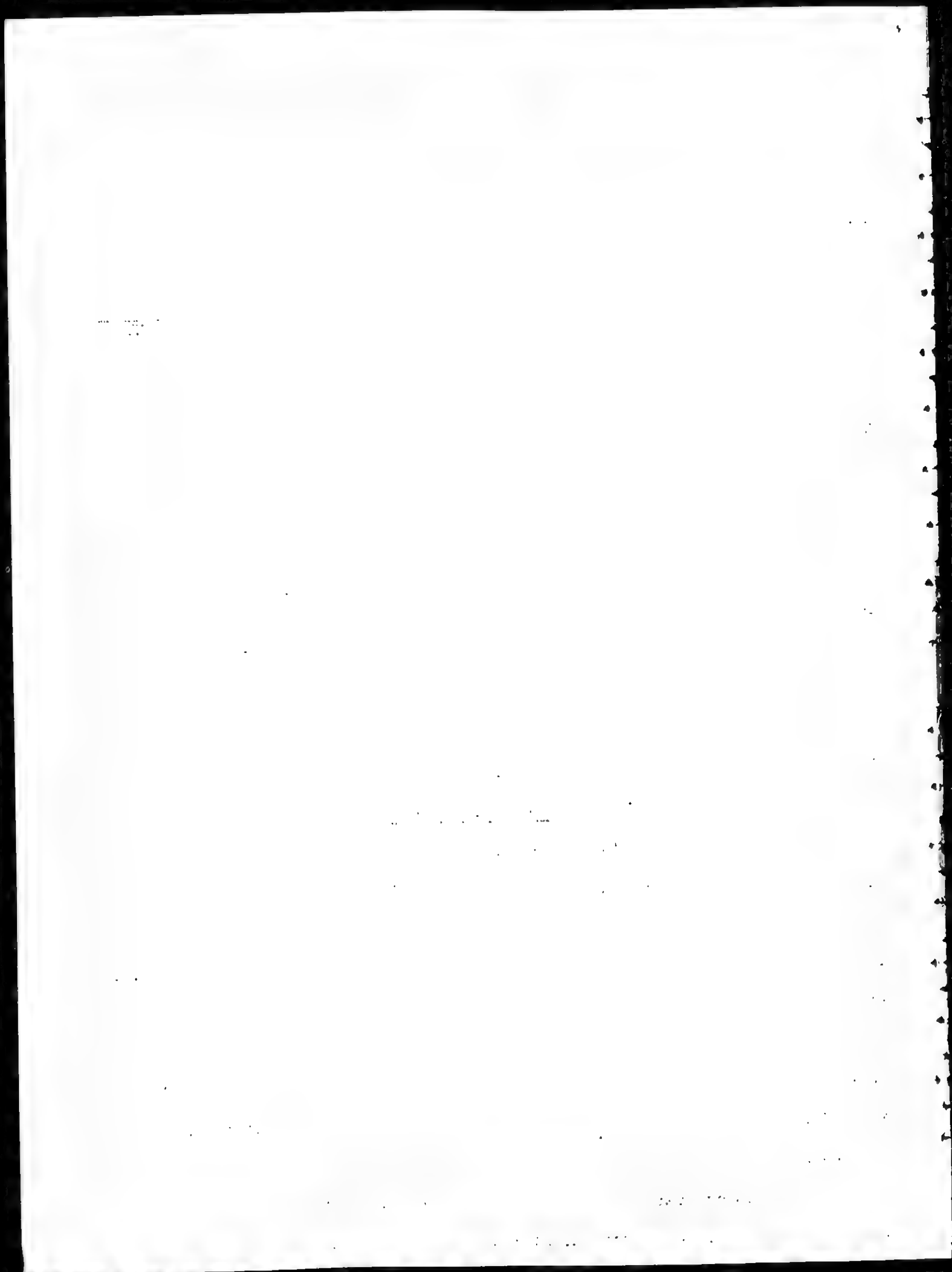
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MOTION TO DISMISS THE INDICTMENT

Now come the defendants and move the Court for an order dismissing the indictment against the defendants in the above entitled cause for the reason that there was misconduct before the Grand Jury, that unlawful evidence was presented to the Grand Jury and by various means of deceit, artifice and design the Grand Jury was inflamed against the defendants in this cause.

There is annexed hereto under the heading of Points and Authorities instances as to improper practices before the Grand Jury and it is believed that the United States Attorney will not dispute or contradict the accuracy of the proceedings set forth therein.

Defendants ask that there be a full and complete hearing in this matter with testimony taken to permit the defendants to point out to the Court in detail



the many instances of misconduct taking place before the Grand Jury.

/s/ James J. Laughlin
James J. Laughlin
National Press Building
Washington, D. C.

/s/ William J. Garber
William J. Garber
412 Fifth Street, N.W.
Washington 1, D. C.
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of April, 1964 mailed copy of the foregoing Motion to Dismiss the Indictment and Points and Authorities in support thereof to David C. Acheson, Esq., United States Attorney, U. S. Court House, Washington, D. C.

/s/ James J. Laughlin
James J. Laughlin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

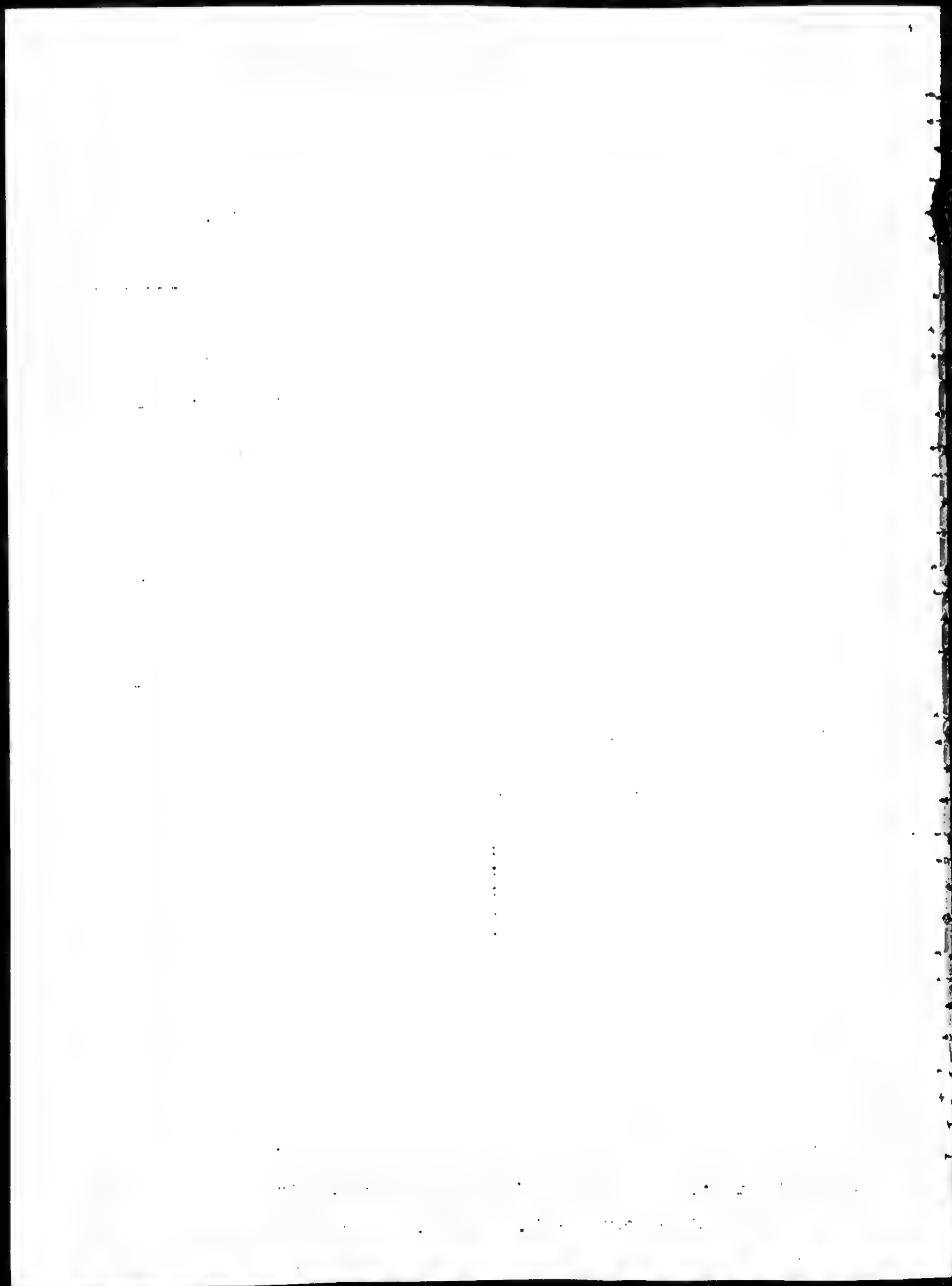
ALLAN U. FORTE
and
JAMES J. LAUGHLIN

Criminal No. 600-63

Filed April 1, 1964

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS THE INDICTMENTS

1. Defendants can show in this cause that misconduct took place before the Grand Jury and that it is a case that should be governed by the old opinion in United States v. Farrington, 5 Fed. 343, in the District Court for the Northern District of New York in 1881. While this is an old case, it is cited by later authorities for the very contentions we make herein:



"Other authorities, however, are found which have adopted more liberal and as it seems to me more sensible views, and assert the right and duty of the court to exercise a salutary supervision over the proceedings of a grand jury. It is only practicable to do this by removing the veil of secrecy whenever evidence of what has transpired before them becomes necessary to protect public or private rights. Thus, in Low's Case, 4 Greenl. 439, the grand jurors were permitted to testify that they acted under the mistaken impression that it was sufficient if a majority of the jurors concurred in finding a bill and twelve had not concurred. * * * In Burdick v. Hunt, 43 Ind. 381, it is said there is no sufficient reason why the prosecuting attorney may not be called upon in a court of justice to disclose any evidence given or proceedings had before a grand jury."

And then the Court continued:

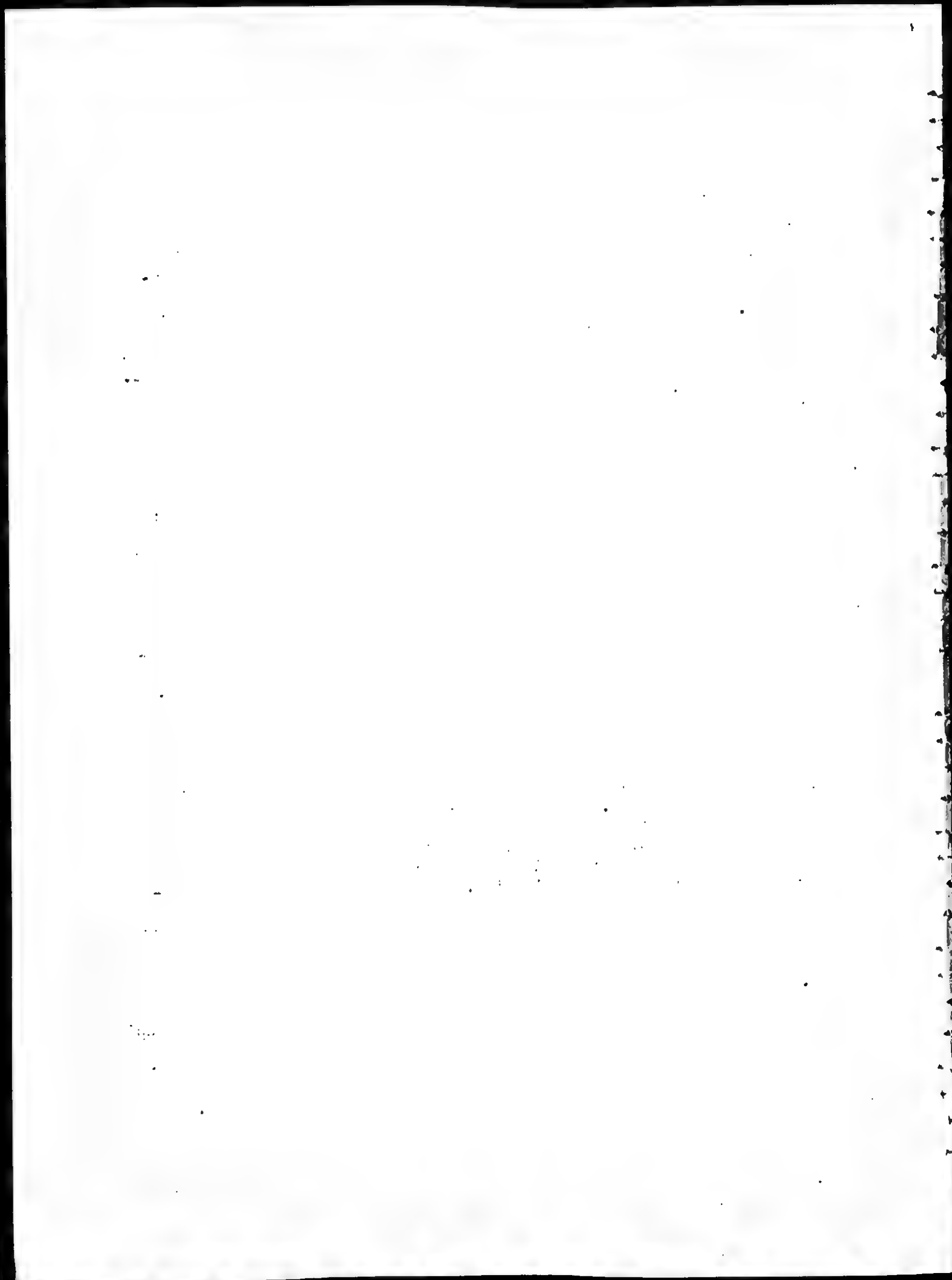
"The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom * * *."

And the Court said further:

"It would be difficult to find a case which more forcibly illustrates the good sense and justice of the rule which permits a free disclosure than the present. It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter."

2. It is not necessary to set forth in this pleading the exact nature of unlawful evidence before the Grand Jury. This is well spelled out in the opinion of Judge Youngdahl in United States v. Laughlin, 222 F.Supp. 264, and in the opinion of Judge Curran in United States v. Laughlin, 223 F.Supp. 623.

3. We now make reference to certain Grand Jury testimony to show that the Grand Jury was inflamed against both defendants in this cause. With Sergeant Wallace on the stand the following occurred before the Grand Jury on March 26, 1963, at Page 27:



"BY MR. SULLIVAN:

Q And as a result of certain information which came to the attention of the United States Attorney from Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin that Jean Smith of the Baltimore area had a record or a reputation as a call-girl and prostitute?

A I did check it out."

At Page 28 we find this:

"A JUROR: Mr. Laughlin seems to be throwing around an awful lot of accusations."

At Page 29:

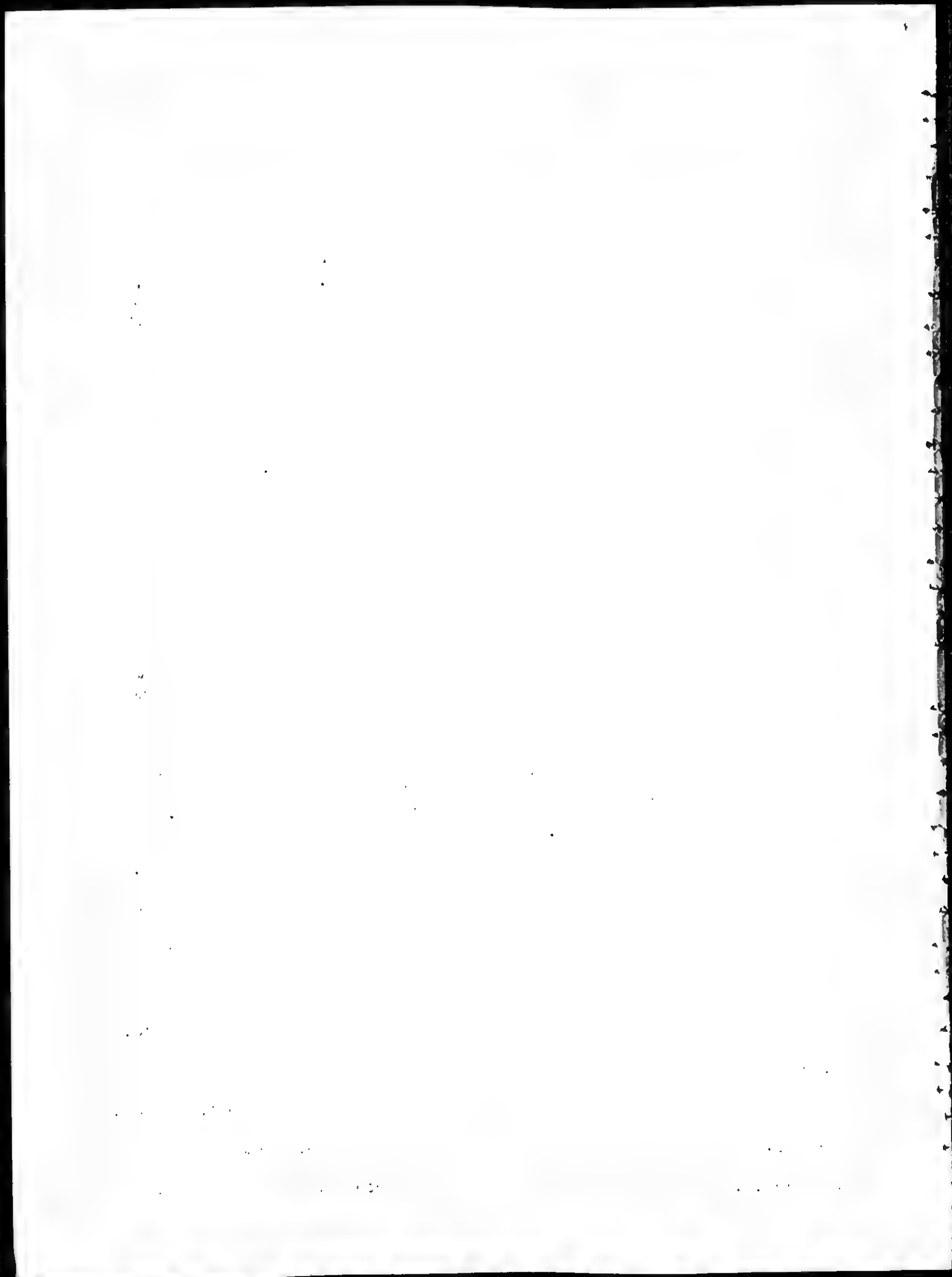
"JUROR: This man Laughlin has made a charge."

And at Page 30 the following statement was made by a juror:

"We had this charge interjected into this case against this Hill woman, the same charge. I don't know what they are going to try to dig up on her. Mrs. Johnson came in here, and you know what she said. And I think in the future, on these witnesses we have had an awful lot of counter-charges here, and a lot of people make counter-charges when they are trying to cover up something against themselves. And I think we should be awfully careful before we get into the record any aspersions or any innuendoes, because I think this Grand Jury wants to hold this testimony on a little higher standard that (sic) Jim Laughlin's concept of trying a law case. That's all I have to say."

4. After one Bernice Gross had testified before the Grand Jury, the Assistant United States Attorney Harold J. Sullivan was not satisfied with her answers and brought her to the office of Assistant United States Attorney Hannon and she was hammered, threatened and browbeaten for a long period of time. This was an unusual procedure and Mr. Sullivan and Mr. Hannon brought to Mr. Hannon's office the Official Grand Jury Reporter.

When this motion is argued, we will bring to the attention of the Court other vital and specific portions of testimony before the Grand Jury showing not only the receipt of illegal evidence but misconduct justifying dismissal



of the indictments.

/s/ William J. Garber
William J. Garber

/s/ James J. Laughlin
James J. Laughlin
Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

V.

ALLAN U. FORTE
JAMES J. LAUGHLIN

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Criminal Case No. 600-63

Filed April 1, 1964

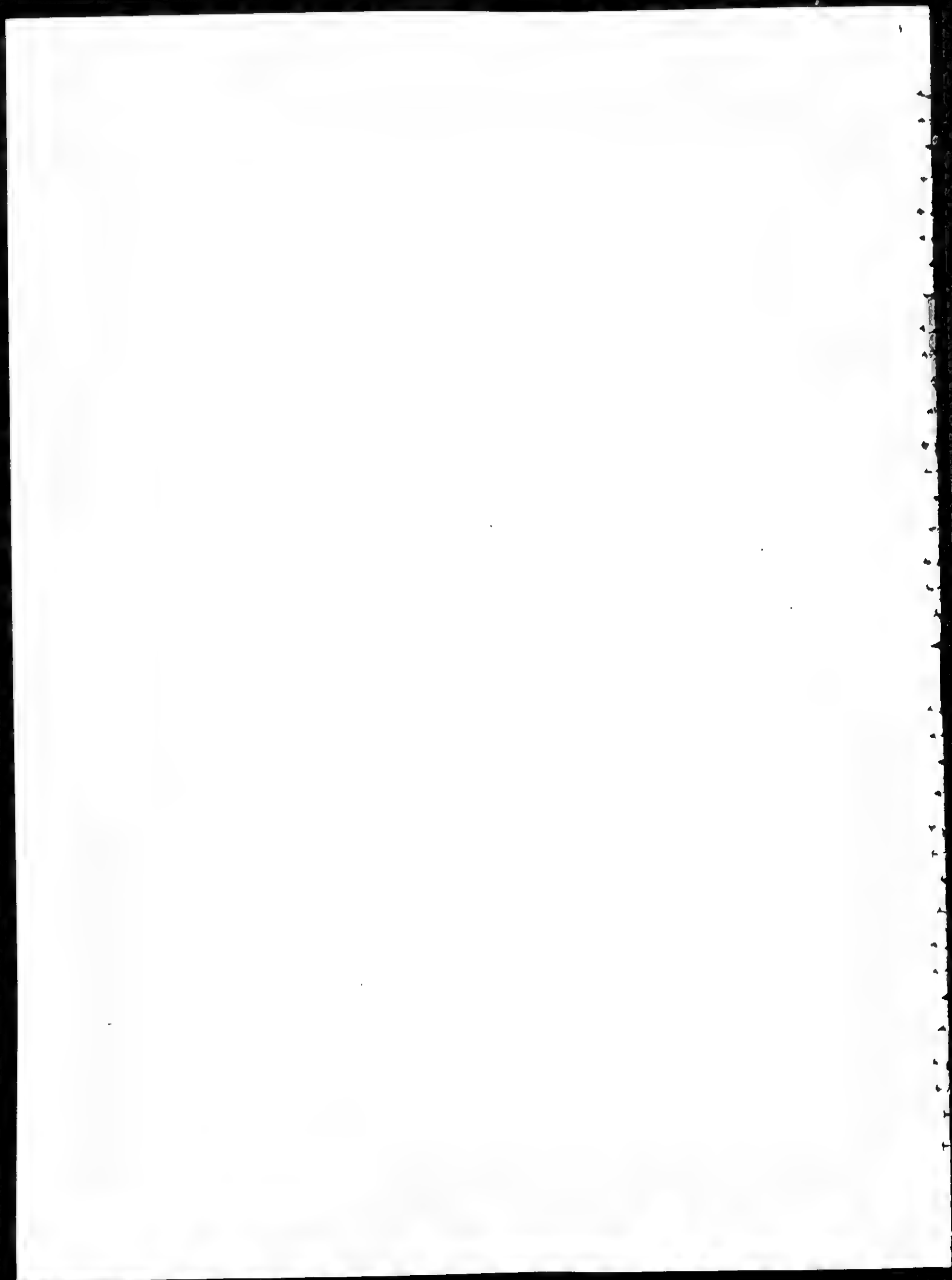
MOTION TO SUPPRESS

Now come the defendants and move the Court to suppress all evidence in this cause for the reason that the evidence obtained by the United States Attorney and the Assistant United States Attorney was obtained as a result of a violation of the Federal Communications Act, Title 47, Section 605, United States Code, and hence was unlawfully obtained, and the defendants make the further point that this constituted a violation of their constitutional rights and there is annexed hereto and made a part hereof an itemized statement as to the various overt acts referred to in the indictment.

The defendants ask that there be a full hearing in this cause with testimony taken which the defendants contend will clearly show:

A. That the evidence received by the Grand Jury in this cause was in violation of the Federal Communications Act.

B. That the evidence obtained was the result of misconduct before the Grand Jury.



C. That the constitutional rights of the defendants were violated and hence there was an unlawful search and seizure.

D. That the rights of privacy of the defendants were violated in that there was a concerted and organized attempt to deprive the defendant Forte of effective assistance of counsel.

Other matters of record will be brought to the attention of this Court at the time of argument on this motion which in the judgment of the defendants will conclusively demonstrate that the constitutional rights of the defendants were violated and that the motion to suppress should be granted.

/s/ William J. Garber
William J. Garber
412 Fifth Street, N.W.
Washington 1, D. C.

/s/ James J. Laughlin
James J. Laughlin
National Press Building
Washington 4, D. C.
Counsel for Defendants

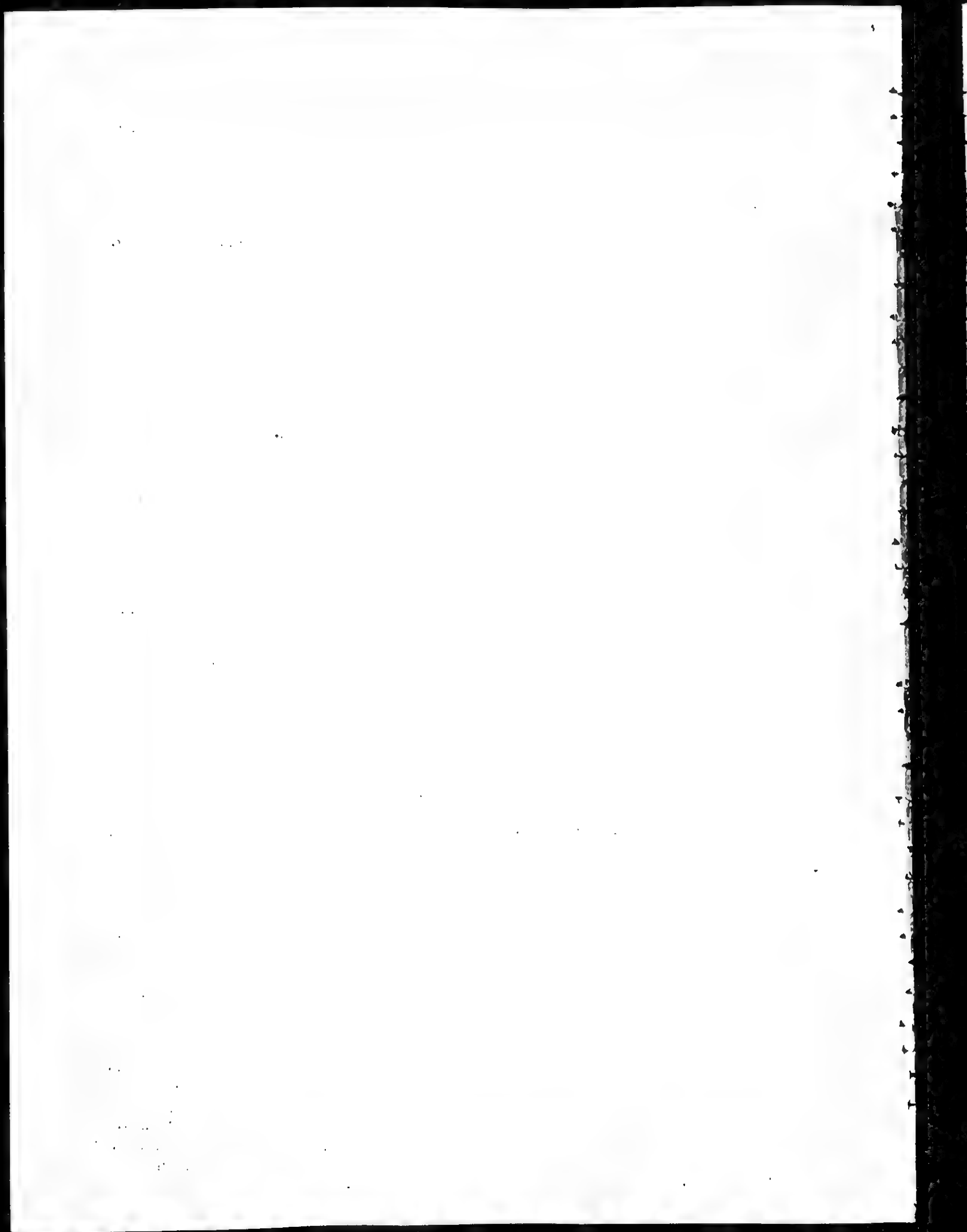
CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of April, 1964 mailed copy of the foregoing Motion to Suppress to David C. Acheson, Esq., United States Attorney, U. S. Court House, Third and Constitution Avenue, N.W., Washington, D. C.

/s/ James J. Laughlin
James J. Laughlin

There was annexed to the Motion to Suppress an "Itemized Statement As To Overt Acts", and as to each act this was stated:

"Defendants ask that all evidence with respect to overt act numbered 1 (through 71) be suppressed for the reason that evidence so obtained was in violation of the constitutional rights of the defendants and was the product of illegal transactions on behalf of the United States Attorney in that the Federal Communications Act was violated, and it should further be suppressed for the reason that it constituted an unlawful search and seizure and violation of the right of privacy."



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ALLAN U. FORT^E, Et Al

Criminal No. 600-63

Filed April 8, 1964

SUPPLEMENT TO MOTION TO DISMISS

Now come the defendants and in support of their motion to dismiss the indictment and to substantiate their contentions that the Grand Jury was biased in this cause and that the indictment should be dismissed on account of said bias, calls attention to the affidavit of James J. Laughlin annexed hereto and made a part hereof.

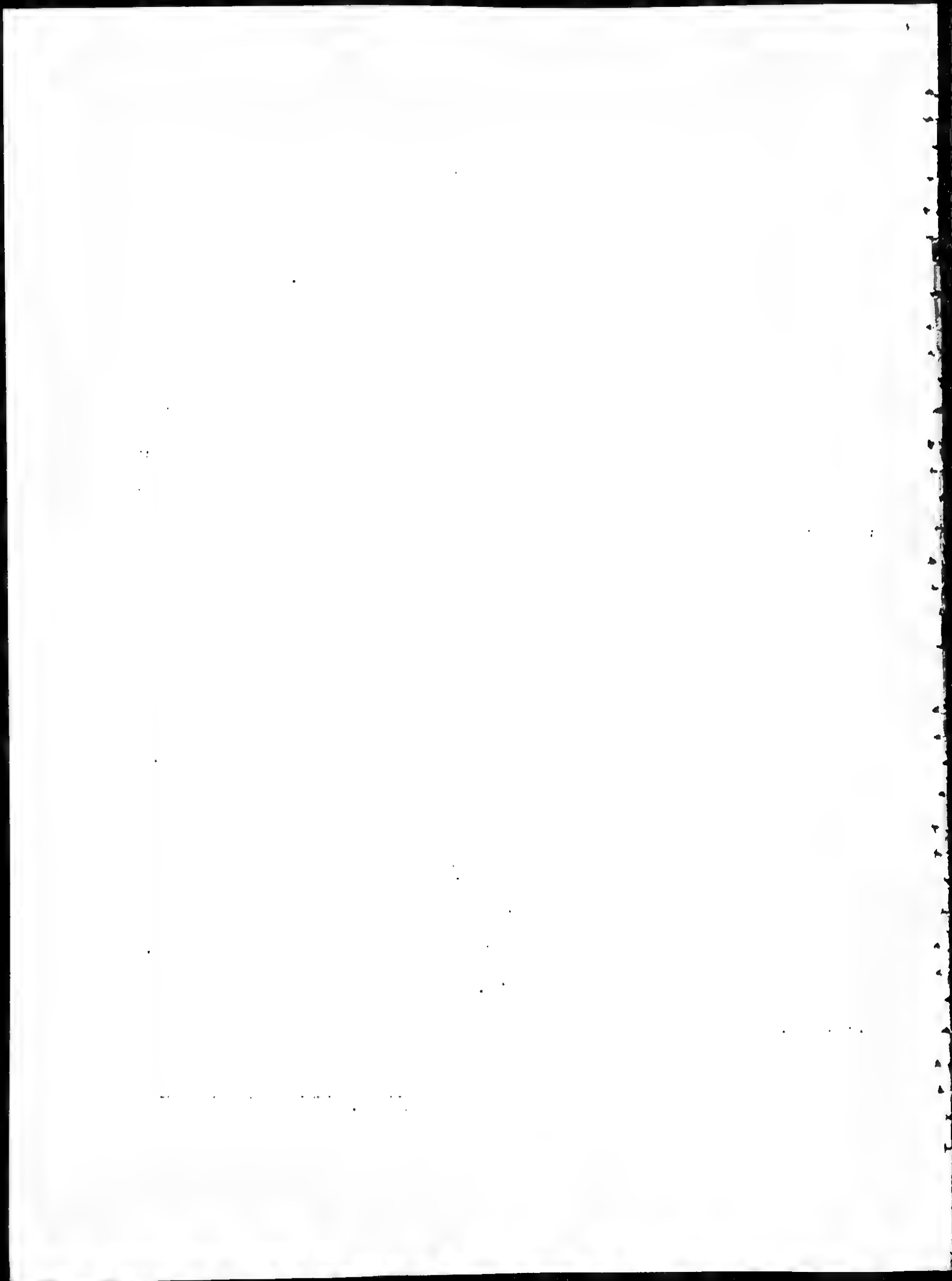
/s/ William J. Garber
William J. Garber
412 Fifth Street, N.W.
Washington 1, D. C.

/s/ James J. Laughlin
James J. Laughlin
National Press Building
Washington 4, D. C.
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of April, 1964 personally delivered copy of the foregoing Supplement to Motion to Dismiss to David C. Acheson, Esq., United States Attorney, U. S. Court House, Third and Constitution Avenue, N.W., Washington, D. C.

/s/ James J. Laughlin
James J. Laughlin



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ALLAN U. FORTE, Et Al

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Criminal N. . 600-63

Filed April 8, 1964

AFFIDAVIT OF JAMES J. LAUGHLIN

James J. Laughlin, being first duly sworn on oath as required by law, deposes and says that he is one of the defendants herein and in order that the Court can properly pass upon the motion to dismiss the indictment based on a biased Grand Jury, it is necessary and essential that the Court have before it the complete testimony of Joyce Johnson and her husband, Theodore Johnson, before the Grand Jury.

Affiant says that at the time Joyce Johnson appeared before the Grand Jury, he did not represent the said Joyce Johnson and had no contact with her and affiant says that misconduct was indulged in by Assistant United States Attorney Harold J. Sullivan, with the consent and connivance of United States Attorney David C. Acheson and Assistant United States Attorney Joseph M. Hannon, and that by various means and designs the said Sullivan, with the consent and connivance of the said Acheson and the said Hannon, inflamed the Grand Jury against affiant and as a result of which the Grand Jury was biased and could not deliberate fairly, justly and impartially.

Affiant says upon information and belief that the said Joyce Johnson was constantly badgered and threatened and intimidated before the Grand Jury and that the said Sullivan, with the consent and connivance of the said Acheson and the said Hannon, well knowing that they intended to indict the said Joyce Johnson, persisted in communicating with her and endeavoring to induce her to give false testimony in violation of the law.

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation of the country and the progress of the work during the year, and the second section deals with the results of the work during the year.

2. The second part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

3. The third part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

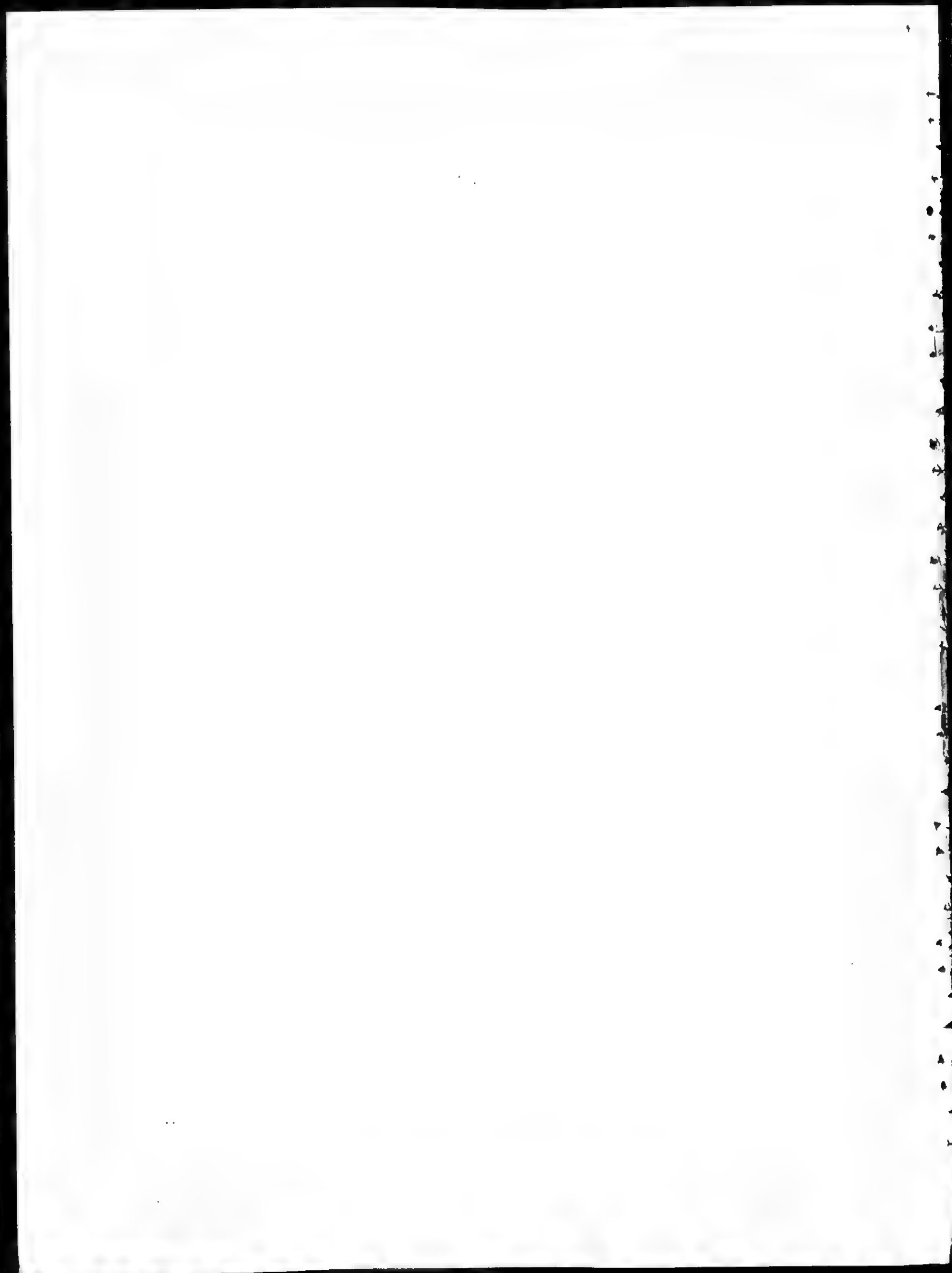
4. The fourth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

5. The fifth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

Affiant says that it was the intent and purpose of the said Sullivan, the said Hannon and the said Acheson to shield and protect a dishonest police officer, one Samuel E. Wallace, who had solicited a bribe from Allan U. Forte, co-defendant herein, and the said Forte testified under oath in the courtroom of Judge Tamm as to the attempted bribe at the hands of Detective Wallace, and the request was made that the said Wallace take a lie detector test at the hands of the Federal Bureau of Investigation. It was also requested that the administration of justice would dictate that the co-defendant Forte also take a test. The defendant Forte has at all times agreed to take a test at the hands of the Federal Bureau of Investigation and the said Wallace has refused at all times to take a lie detector test. Although the said Sullivan in the courtroom of Judge Youngdahl on or about September 27, 1963 stated that the said Wallace would take a lie detector test, this statement was false. The said Wallace has never taken a lie detector test and to this day has never taken a lie detector test. In fact affiant states emphatically that the said Wallace cannot pass a lie detector test in that the said Wallace well knows that he solicited a bribe from the said Forte and also was in communication with the said Forte on various occasions.

Affiant says that notwithstanding the above and well knowing that the said Wallace was under investigation the said Sullivan, with the consent of the said Acheson and the said Hannon in an attempt to vindicate Detective Wallace, permitted the said Wallace virtually to take over the investigation and to question various witnesses in connection with the investigation. In fact affiant says that the said Sullivan, with the consent and connivance of the said Acheson and the said Hannon, virtually permitted Wallace to investigate himself, although there is no rule of law -- ancient, medieval or modern -- that permits a man to investigate himself.

Affiant says upon information and belief that Detective Wallace inter-



viewed one Joyce Johnson before she appeared before the Grand Jury and that the said Wallace in substance said to her:

"You can either be a defendant or a witness, it doesn't make any difference to me. I don't care, you can get ten years and it wouldn't make any difference to me."

Affiant says further that the said Detective Wallace became annoyed with Joyce Johnson when she said she did not know affiant and the said Wallace walked out of the room. At this point, in substance, the said Sullivan said:

"The reason he is upset is because on the stand Mr. Laughlin had Forte saying he had tried to bribe him and the investigation was ordered on Wallace. We got to clear this up."

Affiant says further that the said Sullivan, with the consent and connivance of the said Acheson and the said Hannon, repeatedly had calls made to the said Joyce Johnson and the calls were perhaps fifteen in number, and that at a later stage when the said Joyce Johnson was represented by Mr. William J. Garber, the said Sullivan said to her:

"How did you happen to get Mr. Garber as your attorney?"

And the said Sullivan asked her:

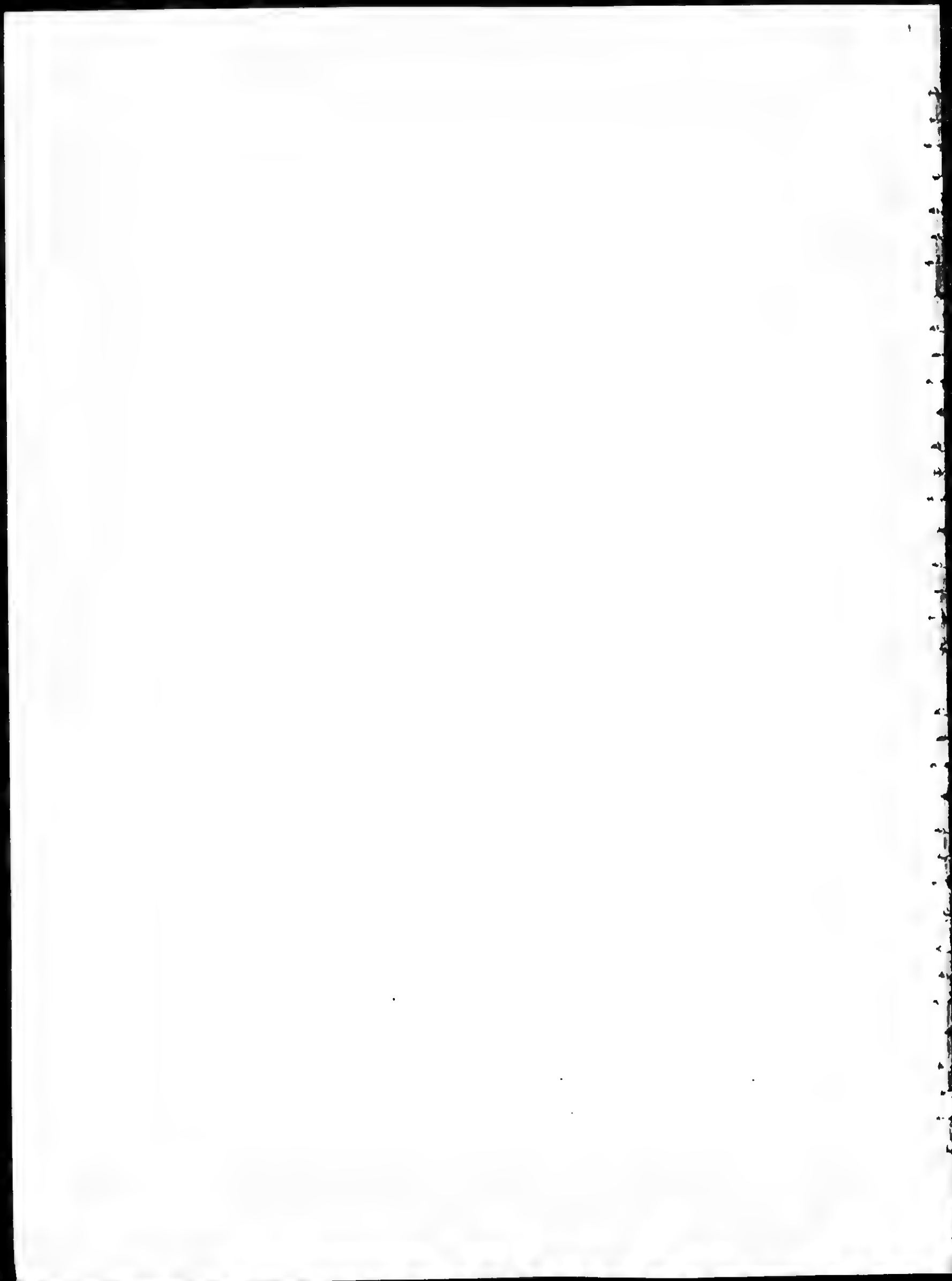
"Have you ever seen Mr. Laughlin in Mr. Forte's office?"

Affiant says as a further instance of bias on the part of the Grand Jury that on one occasion when the said Joyce Johnson appeared before the Grand Jury and there was a recess for lunch, she was asked upon her return:

"Do you know Mr. Laughlin? Where did you have lunch? To whom did you talk? Did you go to a lawyer's office and have a conference with a lawyer about what we talked about down here?"

The said Joyce Johnson replied she had gone down town for lunch, that she did not know Mr. Laughlin and that she was not in Mr. Laughlin's office.

Affiant says further, as evidence of bias on the part of the Grand Jury, that the said Sullivan, with the consent and connivance of the said Acheson and the said Hannon, called the said Joyce Johnson at her home on many occasions as to her knowledge of affiant and that on one occasion the said



Sullivan, with the consent and connivance of the said Acheson and the said Hannon, said to her:

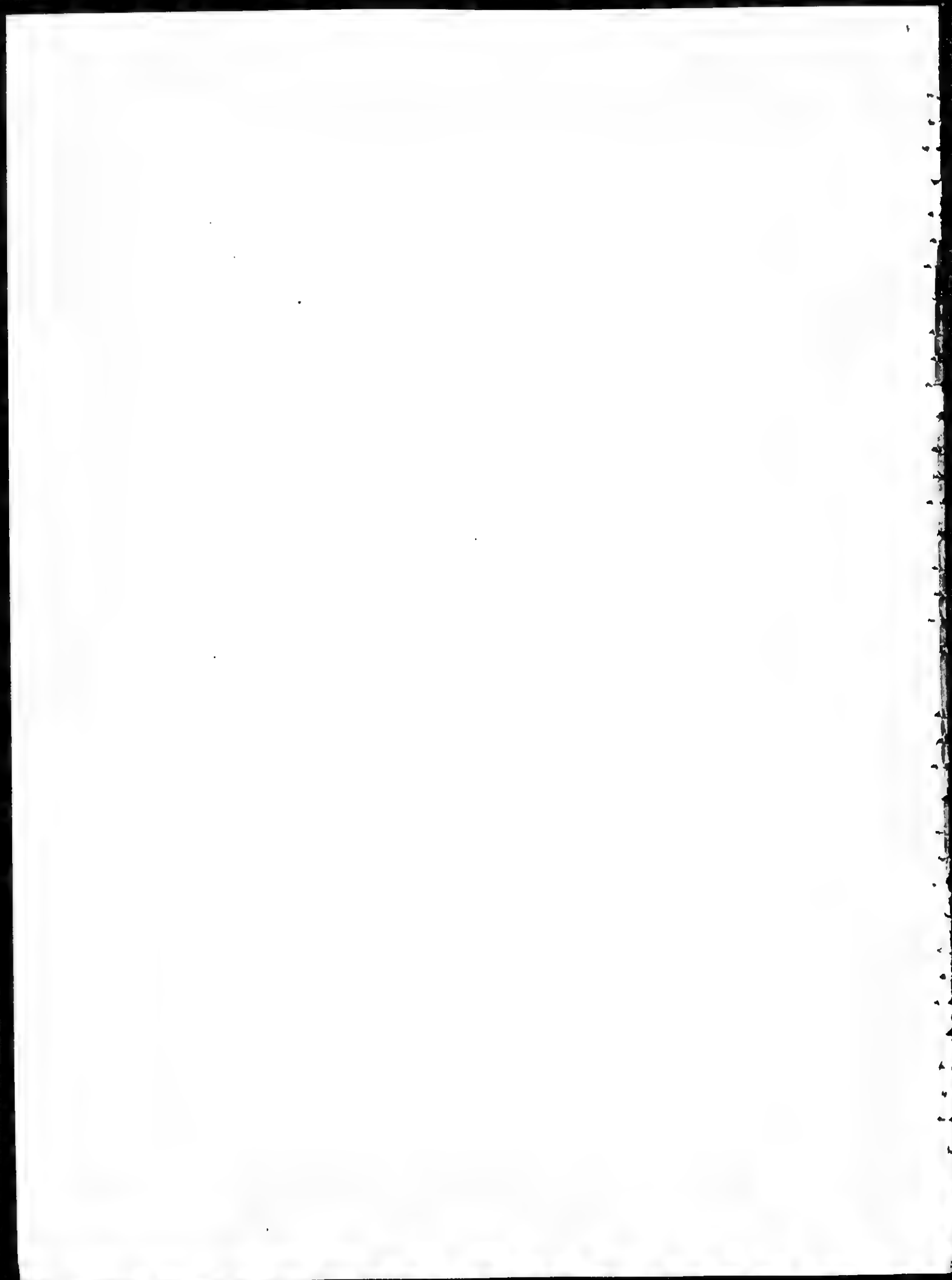
"It is not you I want and I can save you all this difficulty because your husband is a policeman. Remember you are a witness for the Government and you are not to talk to anybody. I really feel sorry for your husband having to involve him like this, but you can either be with me or against me. You can save yourself all this difficulty if you just cooperate and give me the information I need. You're the one person who can give me the information or get it for me. A lot of things you can find out for me. You can either be with me or against me."

Affiant says that the said Joyce Johnson told him that she didn't know anything and the said Sullivan, with the consent and connivance of the said Acheson and said Hannon, repeatedly informed the said Joyce Johnson that her husband would be in serious difficulty if she did not cooperate with the United States Attorney's office and affiant says that all of this took place before the Grand Jury and it is important and essential that this Grand Jury testimony of the said Joyce Johnson be made available to this Court.

/s/ James J. Laughlin
James J. Laughlin

Subscribed and sworn to before me
this 7 day of April, 1964

/s/ Sol Rothbard
Notary Public
District of Columbia



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

V.

ALLAN U. FORTE
and
JAMES J. LAUGHLIN

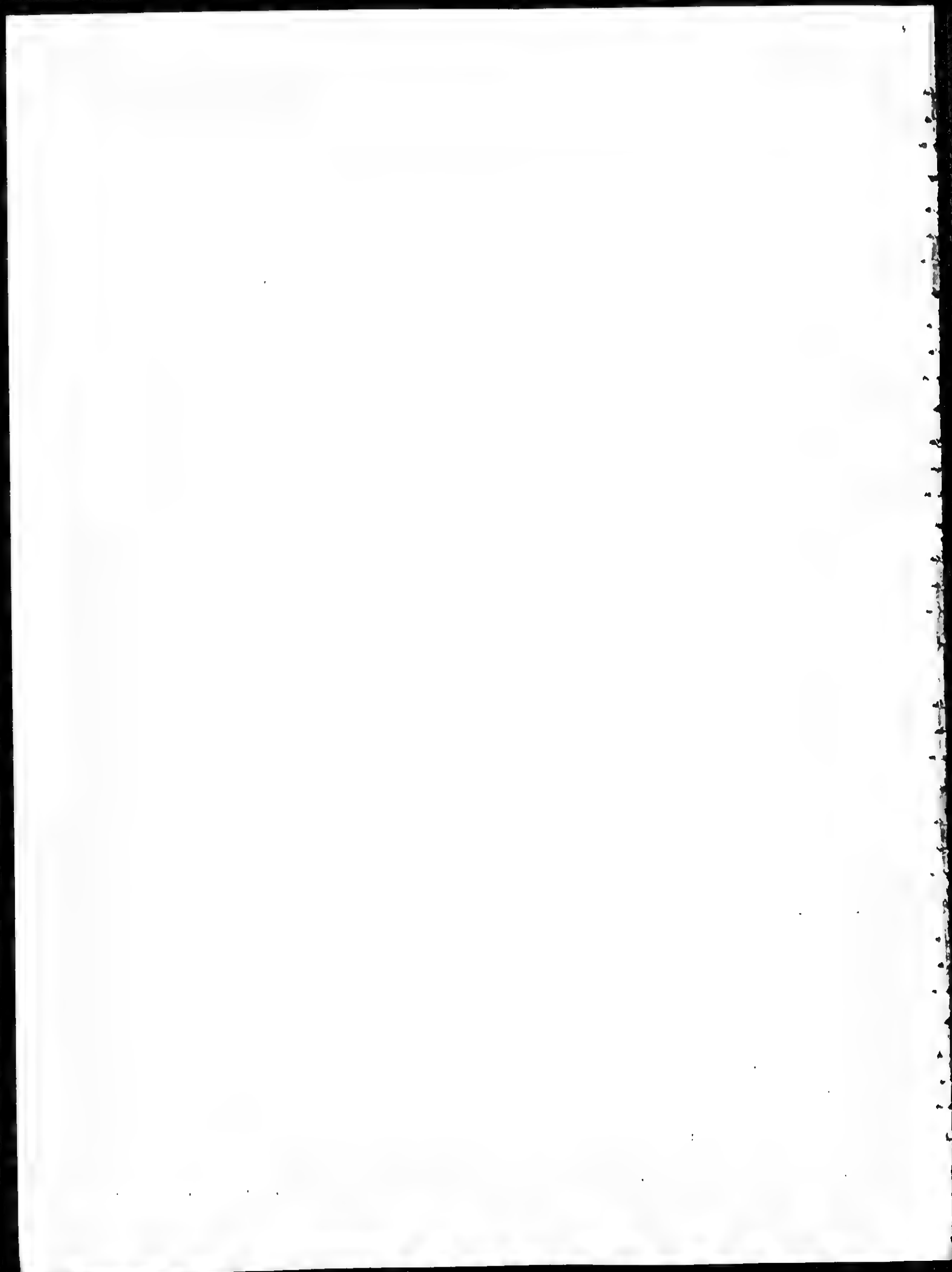
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Criminal No. 600-63

Filed April 16, 1964

AFFIDAVIT OF BIAS AND PREJUDICE

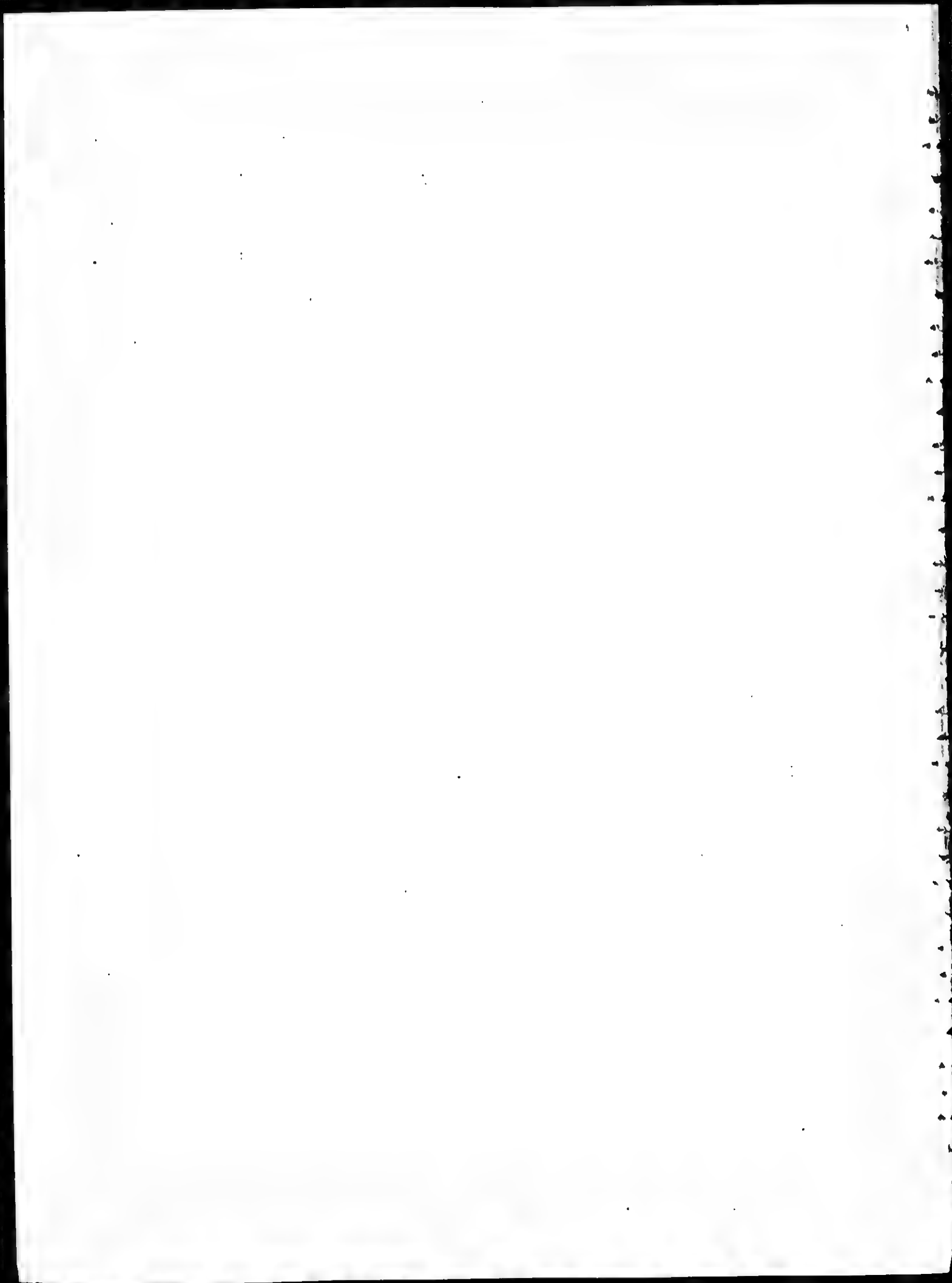
Now comes the defendant James J. Laughlin and says that Judge George L. Hart has a personal bias and prejudice against him and should proceed no further in this cause. The reason for the belief that the said judge has a personal bias and prejudice against him consists in this: The said judge on or about June 1959 approached affiant in the National Press Building and asked affiant if he would testify in his behalf before the Judiciary Committee of the United States Senate. The said judge stated that he had been criticized because of his opposition to the Mallory Rule as announced by the Supreme Court of the United States and stated that he had tried very few criminal cases and since affiant's experience in the field of criminal law had been quite extensive, the said judge felt that affiant's testimony would be helpful. Affiant told the said judge that he would testify in his behalf but further stated to the said judge that it was a matter of comment that the said judge had been closely allied with the police and affiant says upon information and belief that the said judge, while a practicing attorney, did on several occasions testify at certain hearings before the House and Senate in favor of the police and had stated emphatically that the work of the police and the prosecuting officials had been hindered and handicapped by the rulings of the Supreme Court of the United States and the United States Court of Appeals and had expressed his belief that the police should have the right to detain suspects in custody for



a reasonable period of time to complete their investigative work and he favored legislation to this effect. Affiant says further that the said judge had also criticized the decisions of the courts as to cases arising under the Fourth amendment, particularly as to search and seizure and suppression of evidence.

Affiant says that on June 16, 1959 he did testify at a hearing before the Judiciary Committee of the United States Senate involving Judge Hart. Affiant informed the committee that he could only give Judge Hart only a qualified endorsement on account of his close affinity to the police and that he should alter his stand as to police practices.

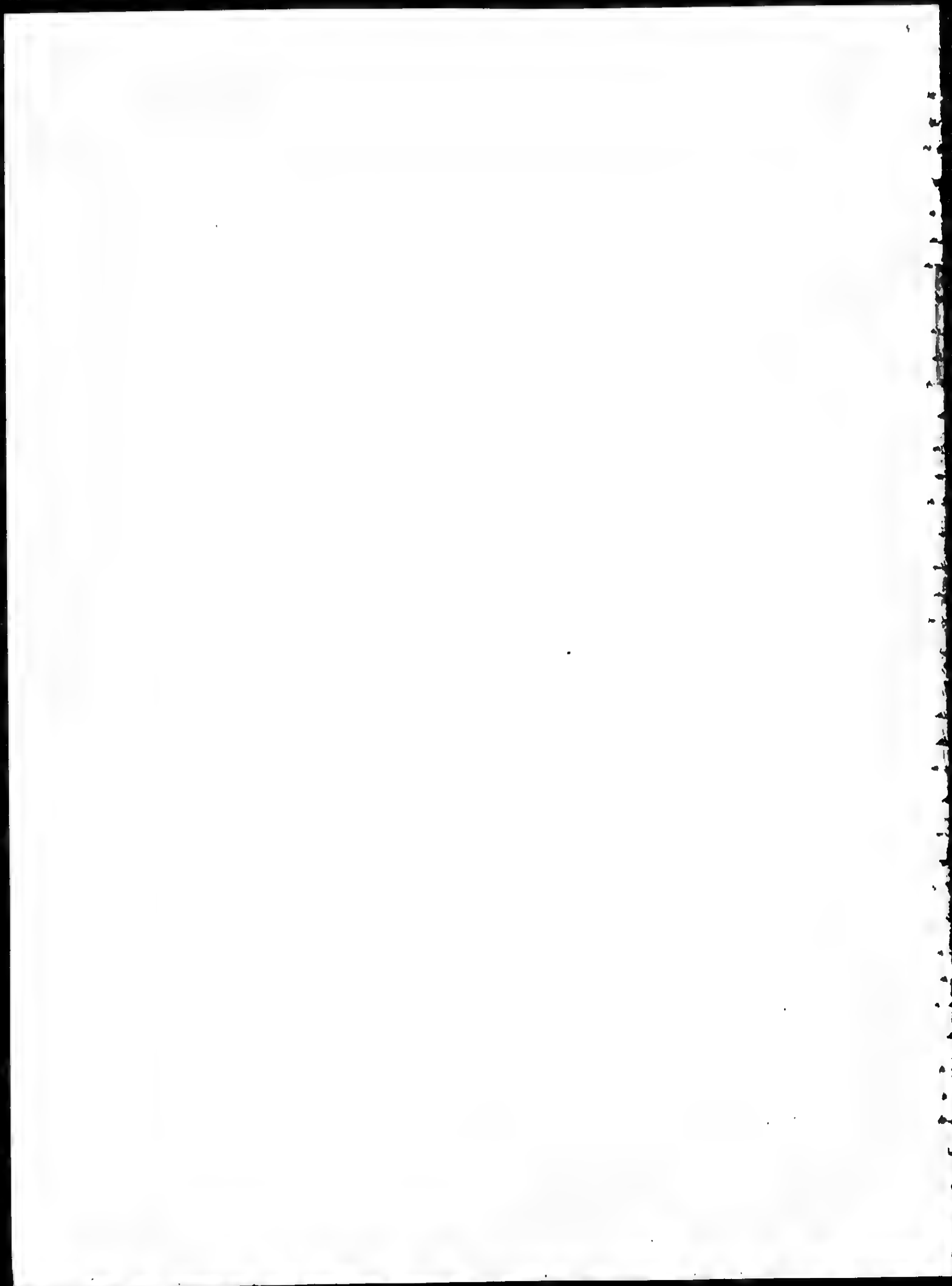
Affiant says that the said judge has a personal bias and prejudice against him on account of affiant's criticism before the said committee and that the said judge should participate no further in this cause for the reason that the integrity of the Police Department is at stake in the present case. Affiant says that the Proceedings against him were not brought in good faith. The indictment against affiant was due to a concerted and organized effort on the part of certain members of the United States Attorney's office to protect a police officer, one Samuel E. Wallace. In Criminal Case No. 741-61 there was testimony that the said Wallace had solicited a bribe from Allan U. Forte, co-defendant herein, and the said Wallace denied that he had solicited a bribe. A motion was filed to compel both Forte and Wallace to submit to a lie detector test at the hands of the Federal Bureau of Investigation. Defendant Forte agreed to take the test. Wallace has at all times refused to take the test. A representative of the United States Attorney's office has made a representation in September 1963 to one of the judges of this court that the said Wallace was now ready to take the test. Wallace, however, refused to take the test. Although requests have been made of the Chief of Police and the Commissioner of the District of Columbia to force the said Wallace to take the test, this has not been done.



Affiant says in the instant case it will be necessary to show that although the said Wallace was himself a target of investigation, he was virtually permitted to take over the inquiry, and that he was permitted to interview witnesses before they were taken to the Grand Jury room and said Wallace also requested that certain witnesses should take lie detector tests. The said Wallace, although himself under investigation, did by various means and designs endeavor to influence witnesses against affiant and did himself aid and abet and assist certain members of the United States Attorney's office in violating the Federal Communications Act. Affiant says he cannot fully defend himself against the allegations of the indictment unless he is able to fully explore every aspect of Wallace's role in this case and the efforts of the United States Attorney's office in the plan to divert suspicion away from Wallace by indicting affiant. In short, it can be shown that although Wallace was under investigation, he was permitted to investigate himself.

Affiant says that it is his belief that Judge Hart, due to his close affinity to the police as already referred to, will endeavor in every way possible to protect Wallace and to rule out any attempt on the part of the affiant to bring to the attention of the jury the role played by Wallace and others allied with him in this case.

Affiant says that while the statute contemplates that the affidavit of bias and prejudice shall be filled "not less than ten days before the beginning of the term at which the proceeding is to be heard", it was impossible to file it sooner for the reason that the case was not assigned to Judge Hart until April 14, 1964. In fact under the assignment of judges for the term beginning April 7, 1964, Judge Hart was not listed as one of the judges of the criminal courts and in fact he was listed as the judge assigned to Motions Court No. 2. Therefore, the affidavit is filed at the earliest possible date and of course before the trial gets under way. It was of course



impossible to file the affidavit on April 14th nor could it be filed on April 15th in that the court was in session until about 5:30 P.M. As to whether the affidavit is timely filed, see Willenbring v. United States 306(F)2. 944.

Wherefore, affiant asks that Judge Hart proceed no further in this cause.

/s/ James J. Laughlin
James J. Laughlin

Subscribed and sworn to before me
this 16th day of April, 1964.

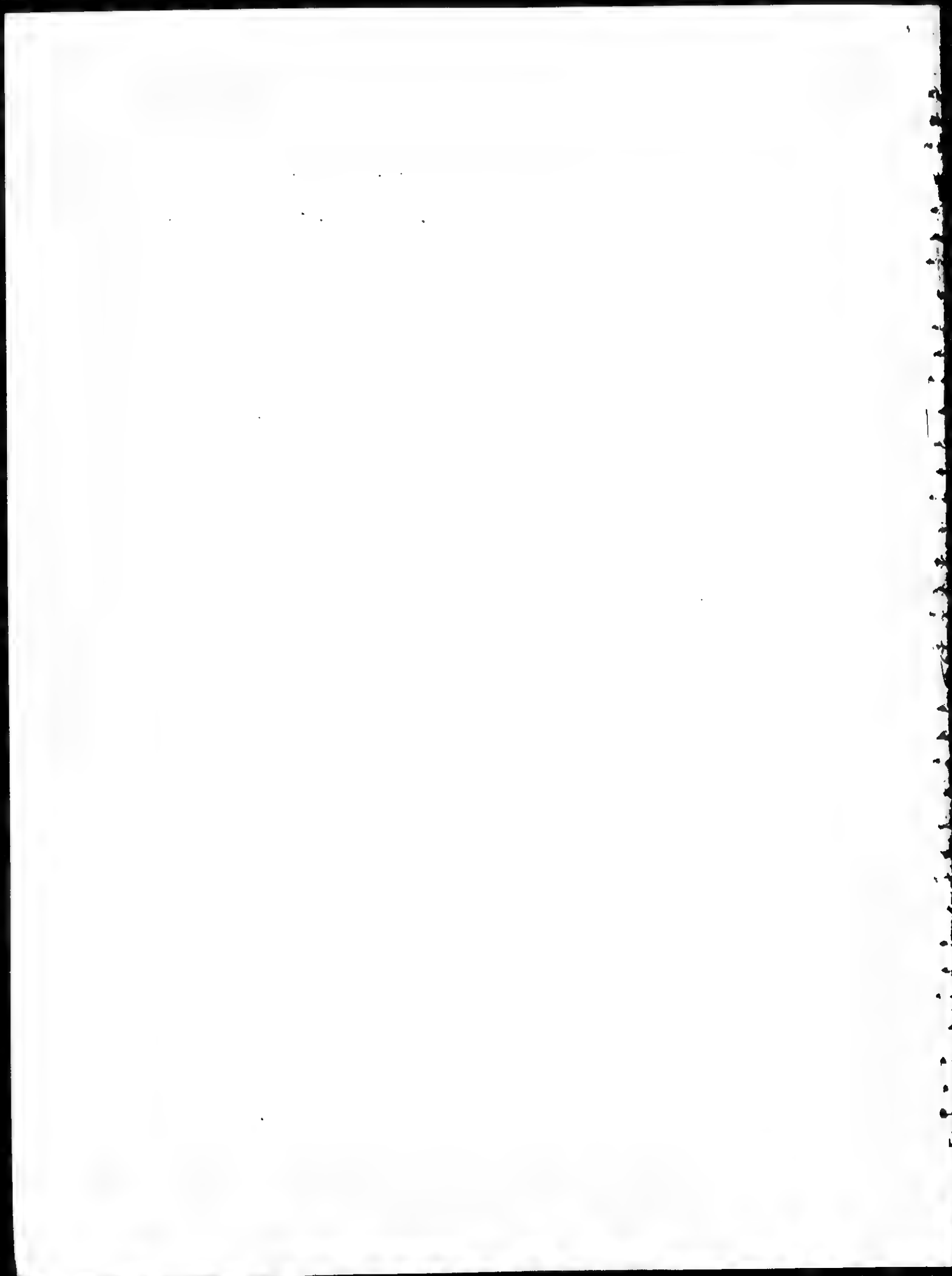
Notary Public
District of Columbia

I certify that the above affidavit of bias and prejudice is filed
in good faith.

/s/ James J. Laughlin
James J. Laughlin
Counsel for Allan U. Forte

I certify that while I have no personal knowledge of the matters contained in the affidavit of bias and prejudice, I certify that is filed in good faith.

/s/ William J. Garber
William J. Garber
Counsel for James J. Laughlin



EXCERPT

Official Transcript of Proceedings

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)

vs.)

ALLAN U. FORTE)
JAMES J. LAUGHLIN,)

Defendants.)

Criminal Action No. 600-63

Washington, D. C.

Friday, April 17, 1964

Before the HONORABLE GEORGE L. HART, JR., U. S. District Judge,
and a jury, for further hearing at 11:00 a.m.

APPEARANCES:

JOSEPH A. LOWTHER,
Assistant U. S. Attorney,
For the Government.

JAMES J. LAUGHLIN, ESQ.,
Attorney for Defendant Forte.

WILLIAM J. GARBER, ESQ.,
Attorney for Defendant Laughlin.

(Out of the presence of the jury)

P R O C E E D I N G S

DEPUTY CLERK: Case of Allan U. Forte and James J. Laughlin.

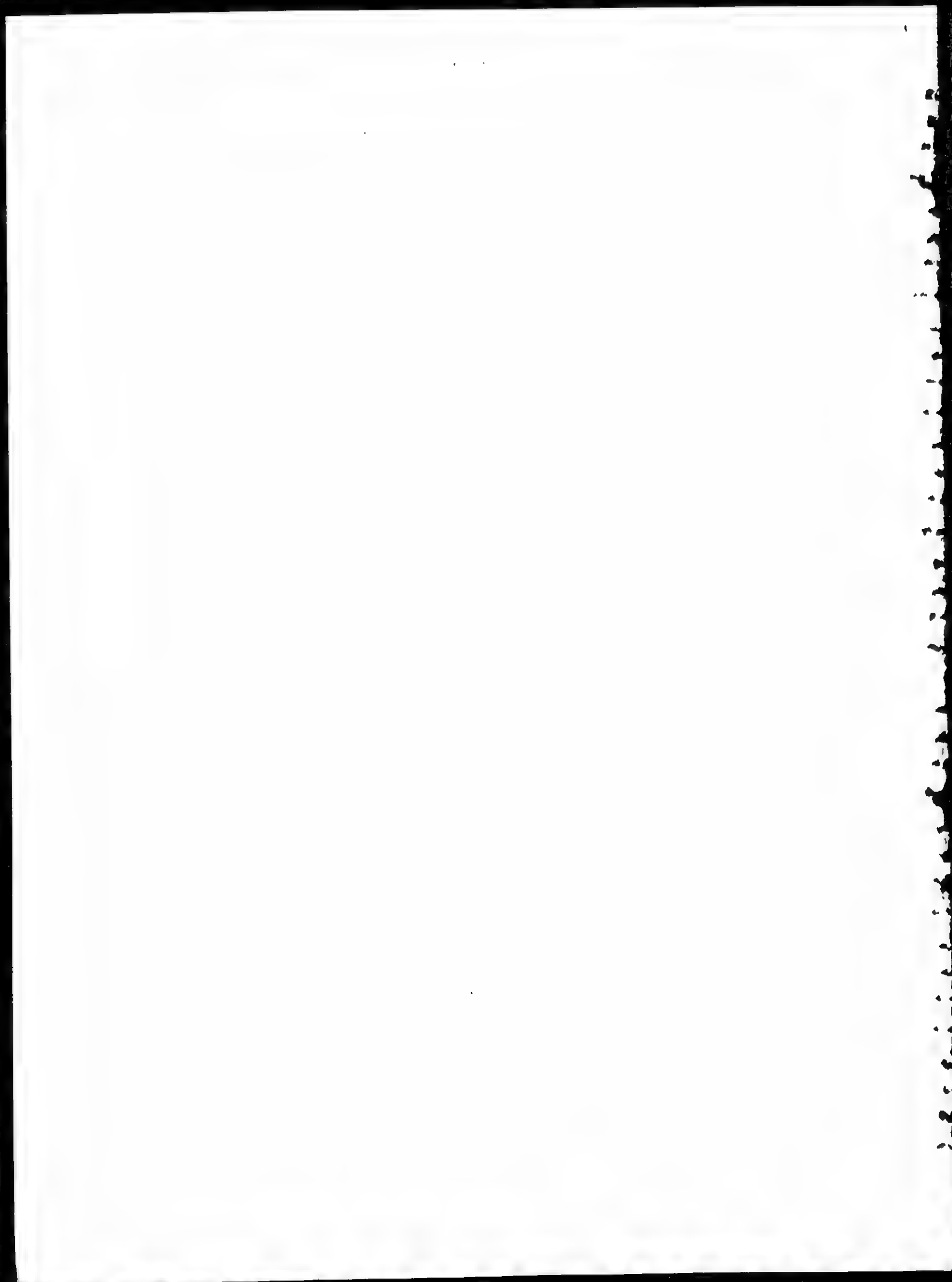
Mr. Lowther: Mr. Laughlin; Mr. Garber.

MR. LAUGHLIN: Your honor, before we get under way, may we come to the bench?

THE COURT: There is no jury here.

MR. LAUGHLIN: No, there is no jury here, Your Honor.

The point I wanted to make was this: Yesterday at the beginning of the session when the affidavit was passed up to you, as I understand, Your Honor made the statement as to the meeting in the Press Building -- or words to that effect -- that was an untruth.



Now, this affidavit was under oath but now I ask if Your Honor would withdraw that statement.

THE COURT: Well, Mr. Laughlin, for the purpose of considering your motion, it makes no difference whether it is true or outrageously untrue. The rules require that we consider them as true even though there is not a word of truth in them, and I so consider it.

But, for the reasons I stated, I hold that it was filed too late. I see no reason to withdraw any statement made.

MR. LAUGHLIN: I didn't understand your last.

THE COURT: I see no reason to withdraw any statement.

MR. LAUGHLIN: All right, then, if Your Honor -- then I will have the leave then to supplement my motion, because I not only did talk to you, Your Honor, I talked to you several times in the Press Building. So then I will, with that -- (Pausing)

THE COURT: Well, I don't deny that I have talked with you several times in the elevator of the Press Building, Mr. Laughlin.

MR. LAUGHLIN: The lobby and also in the Press Club.

THE COURT: Lobby of the Press Building and in the Press Club itself.

MR. LAUGHLIN: Yes.

THE COURT: But I never approached you on the matter which you said I approached you on.

MR. LAUGHLIN: All right. All right. All right, of course, that is Your Honor's version. Mine is the contrary. Now --

THE COURT: I see. Well, we needn't argue on it.

MR. LAUGHLIN: Your Honor is not questioning, are you, that I testified before the Committee.

THE COURT: Not the slightest.

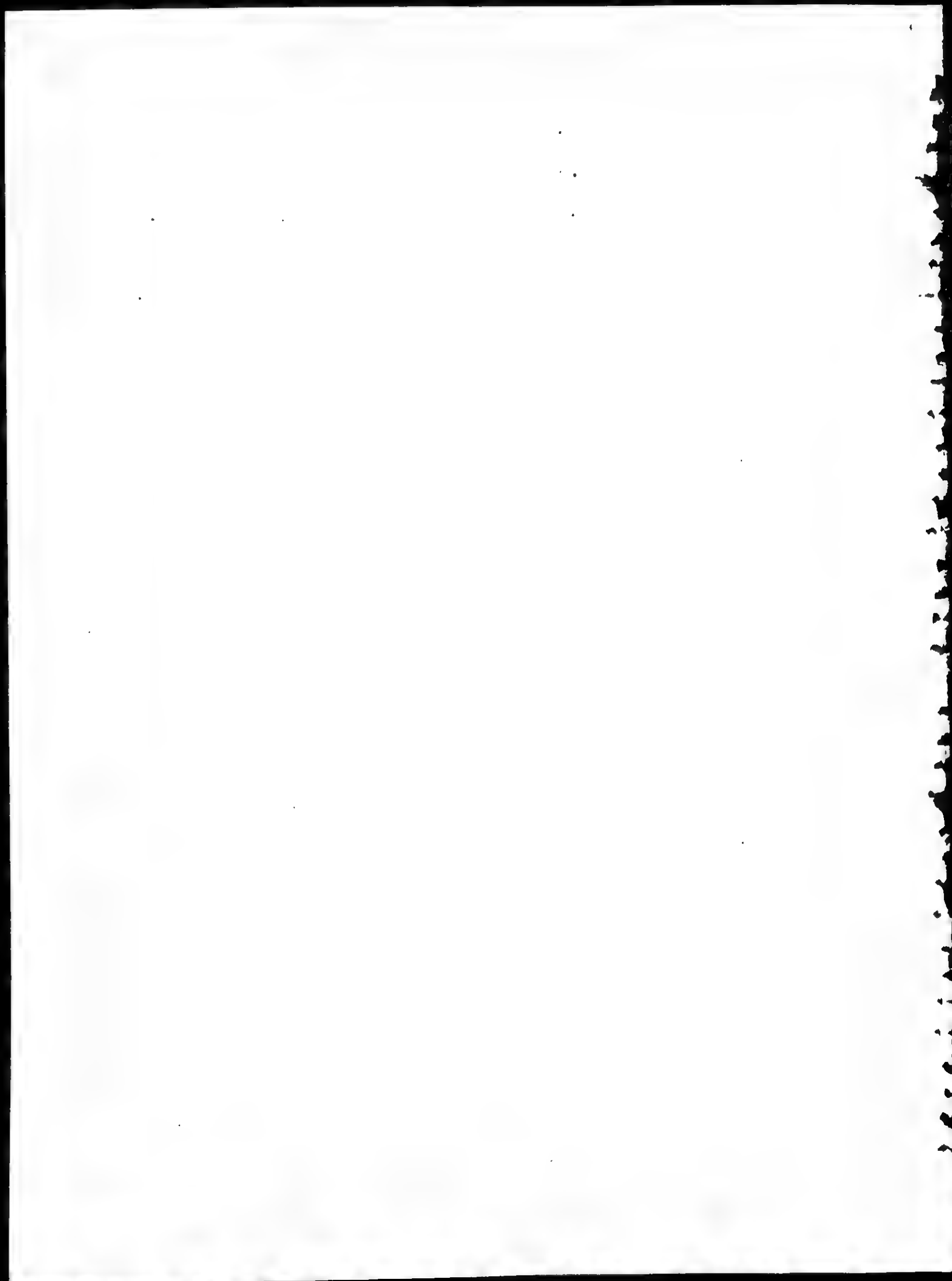
MR. LAUGHLIN: On the day in question.

THE COURT: I have a copy of your testimony in my office. If you would like to see it, it is available to you.

MR. LAUGHLIN: No, no; then there is no question as to that then but Your Honor has one version and I have another; and, as I say again, I adhere to that.

THE COURT: All right, now is there anything else, gentlemen?

(There was no response.)



THE COURT: . Bring the jury in.

(The jury was brought into the courtroom and further proceedings were had before the jury.)

REPORTER'S CERTIFICATE

I, George G. Davis, Jr., certify the foregoing pages, to be the official transcript of the proceedings indicated.

/s/

Official Reporter

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ALLAN U. FORTE, Et Al

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Criminal No. 600-63

Filed April 20, 1964

SUPPLEMENT TO AFFIDAVIT OF BIAS
AND PREJUDICE

James J. Laughlin, defendant herein, supplements his affidavit of bias and prejudice as follows:

On April 16, 1964 the said Judge George L. Hart stated that the allegation contained in the affidavit of bias and prejudice:

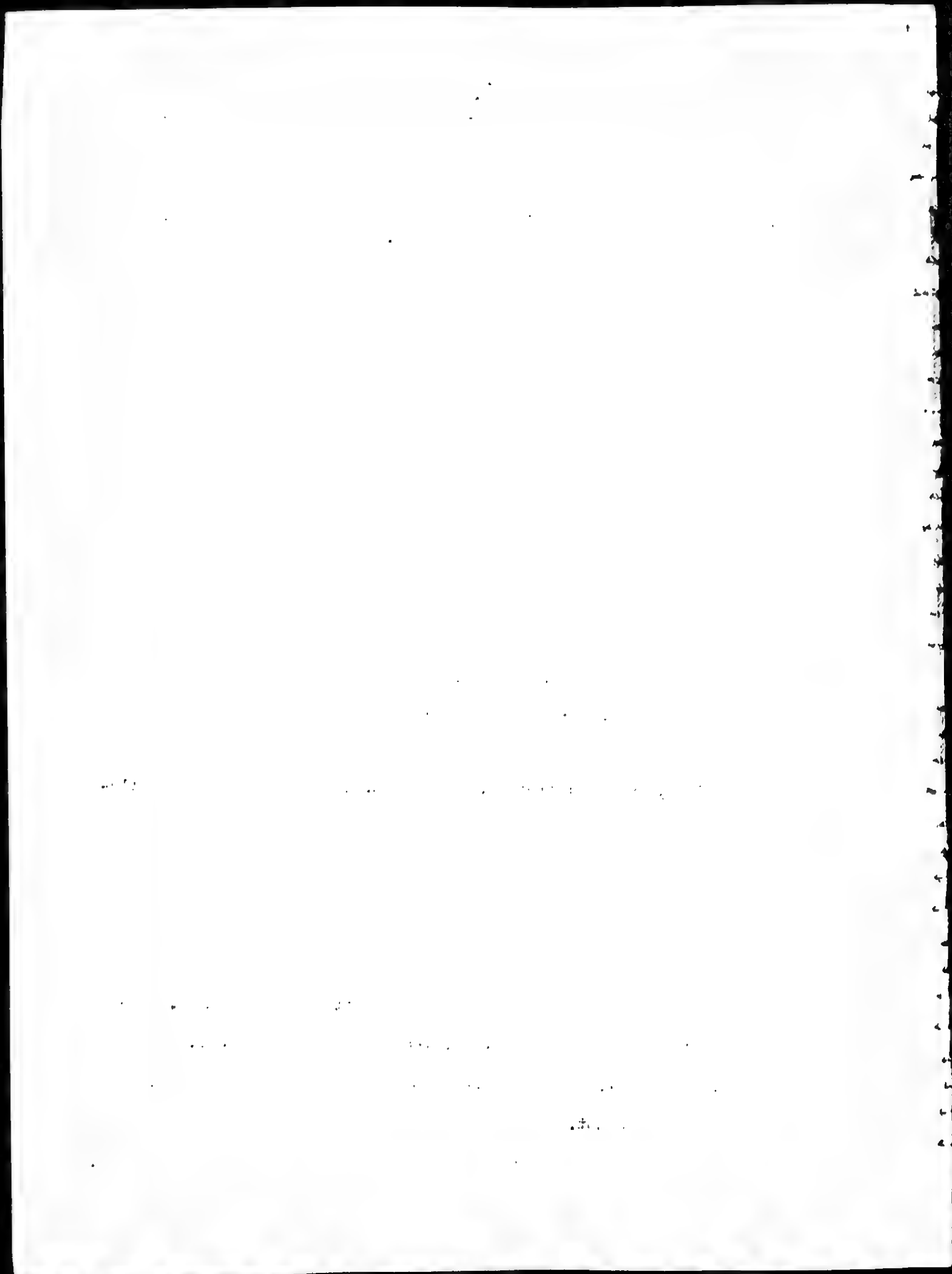
"that the said judge on or about June 1959 approached affiant in the National Press Bldg. and asked affiant if he would testify in his behalf before the Judiciary Committee of the United States Senate"

was an untruth.

On April 17th affiant asked Judge Hart to withdraw the remark. The said Judge refused but again reiterated and reaffirmed his statement.

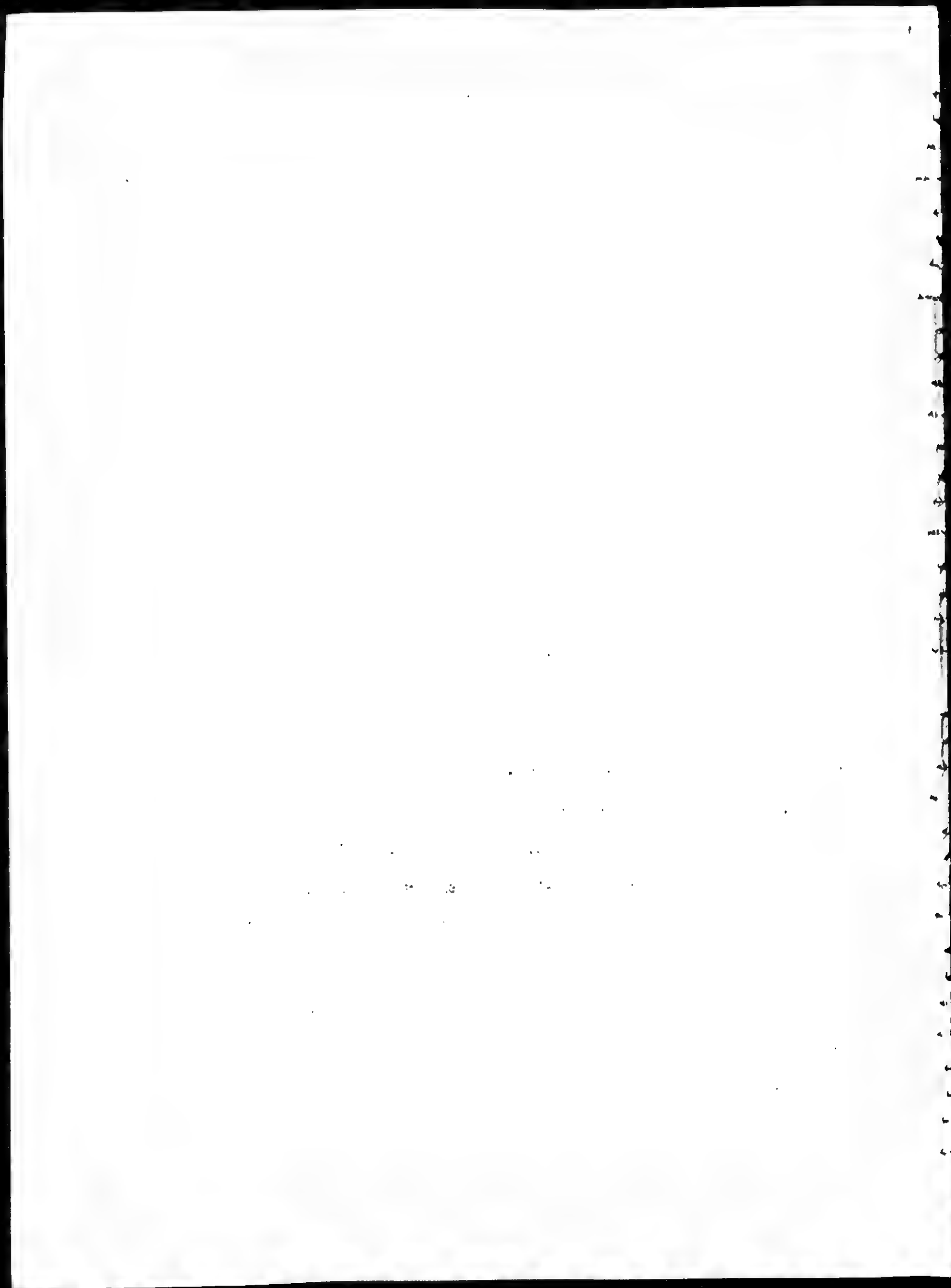
Affiant desires to point out that his allegation was under oath. The remarks of the judge were not.

Affiant says he does not know why the said judge denies the allegatio.



Affiant says that it is true that the said judge did approach him in the National Press Building and did ask him to testify as set forth in the affidavit of bias and prejudice. Affiant says it may refresh the recollection of the said judge when affiant points out that on another occasion in the office of the said judge in the Munsey Building (before the said judge received a recess appointment to this Court) that the said judge asked affiant to see Senator William E. Jenner who was then on the Judiciary Committee of the United States Senate to block the reappointment of a judge of a lower court for whom the said judge expressed a personal dislike and that the said judge stated he would like to see the reappointment blocked.

Affiant desired to point out that the affidavit was filed at the earliest possible date. Affiant annexes hereto and makes a part hereof a list of judges announced for the April term. It will be seen that Judge Hart was slated for Motions Court No. 2. The motions had to be disposed of before the trial began. Tuesday afternoon was taken up with motions and there was a long session on Wednesday. In fact the judge stated that he would continue until the motions were disposed of. In fact the session lasted until about 5:30 P.M. There was of course no opportunity to file the affidavit of bias and prejudice at an earlier time. Affiant further felt that Judge Hart would realize the impropriety of remaining in the case and would of his own volition withdraw since other judges were available and there would be no delay in the trial. Affiant desires further to state that in affiant's opinion Judge Hart's conduct of the hearing on the motions gave further convincing evidence that it was his intent and desire to protect the police at all hazards. Of course when the hearing on the motions was concluded at the end of the day on Wednesday, April 15th and Judge Hart then indicated that he would try the case, affiant very early the next morning began preparation of the affidavit and same was presented. The record will show that affiant gave



the trial judge the opportunity to withdraw before the affidavit was filed. However, the trial judge insisted that it be first filed before he began the reading of it. Although the judge cannot go into the truth or falsity of the affidavit, the trial judge disputed some of the allegations. When he was later asked to withdraw his remarks he refused and again reiterated his charges. The remarks of the trial judge -- contrary to the statute -- made the publication in the newspaper possible.

/s/ James J. Laughlin
James J. Laughlin

Subscribed and sworn to before me
this 20th day of April, 1964.

Notary Public
District of Columbia

I certify that the above is filed in good faith.

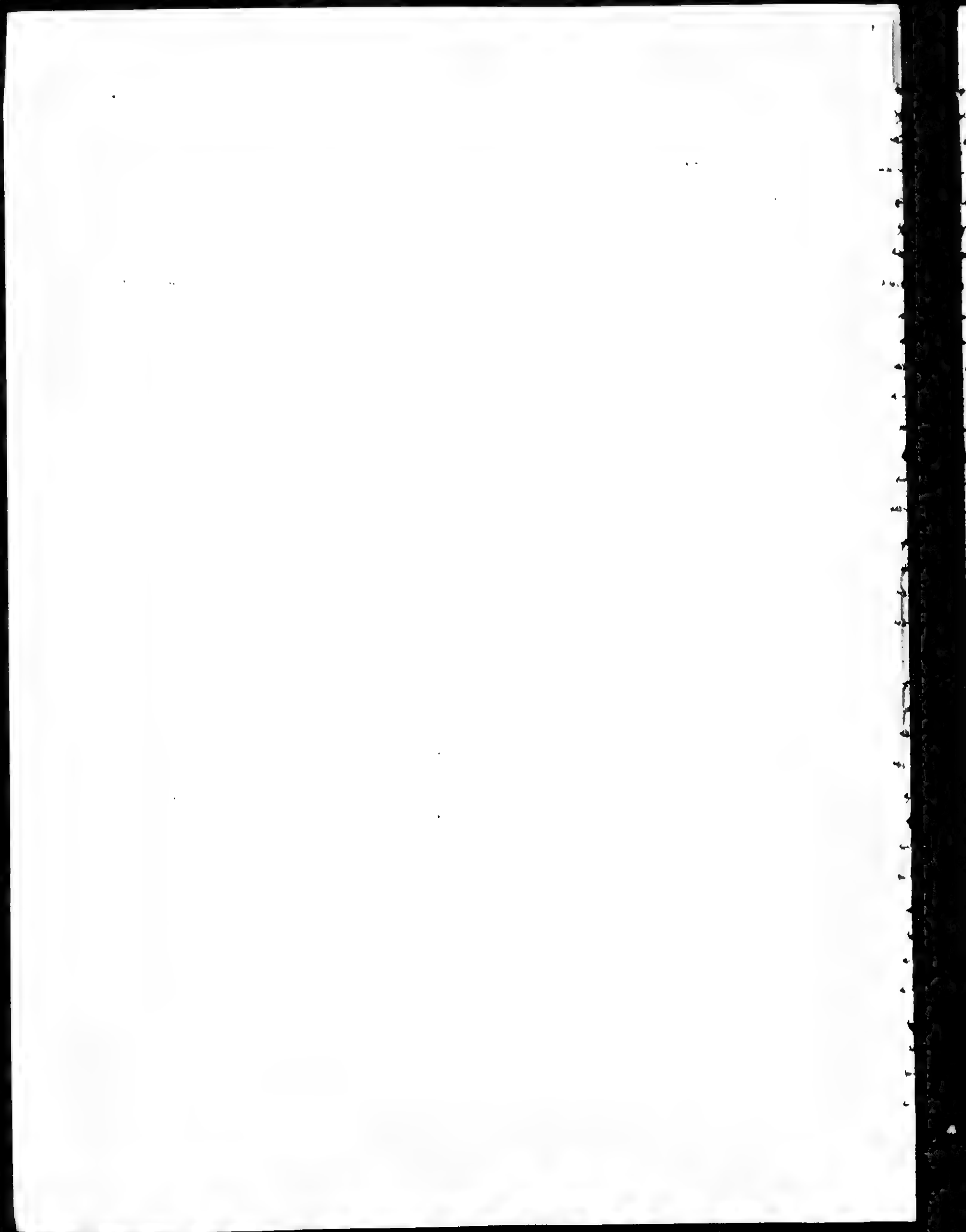
/s/ James J. Laughlin
James J. Laughlin
Counsel for Defendant Allan
U. Forte

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Voting: Chief Judge McGuire and Judges Pine, Holtzoff, Keech, Curran,
Tamm, McLaughlin, Matthews, Youngdahl, McGarraghy,
Sirica, Hart, Walsh, Jones and Robinson

ORDER

IT IS ORDERED That the following assignment of Judges to the
Special Parts of this Court be, and the same is hereby made, effective from
and including April 7, 1964, until further order of the Court:



Assignment Judge, who will try
criminal and civil cases as
exigencies requireChief Judge McGuire

Motions Court No. 1Judge Curran
Motions Court No. 2Judge Hart

Criminal Court No. 1Judge Tamm
Criminal Court No. 2Judge Pine
Criminal Court No. 3Judge McLaughlin
Criminal Court No. 4Judge Sirica
Criminal Court No. 5Judge Jones
Criminal Court No. 6Judge Robinson

Civil Court No. 1 (Jury).....Judge Keech
Civil Court No. 2 (Jury).....Judge Matthews
Civil Court No. 3 (Jury).....Judge McGarraghy
Civil Court No. 4 (Jury).....Judge Walsh
Civil Court No. 5 (Non-Jury and
Pretrial).....Judge Holtzoff
Civil Court No. 6 (Non-Jury and
Condemnation).....Judge Youngdahl

BY THE COURT:

/s/ Matthew F. McGuire
Chief Judge

March 10, 1964

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ALLAN U. FORTE, Et Al.

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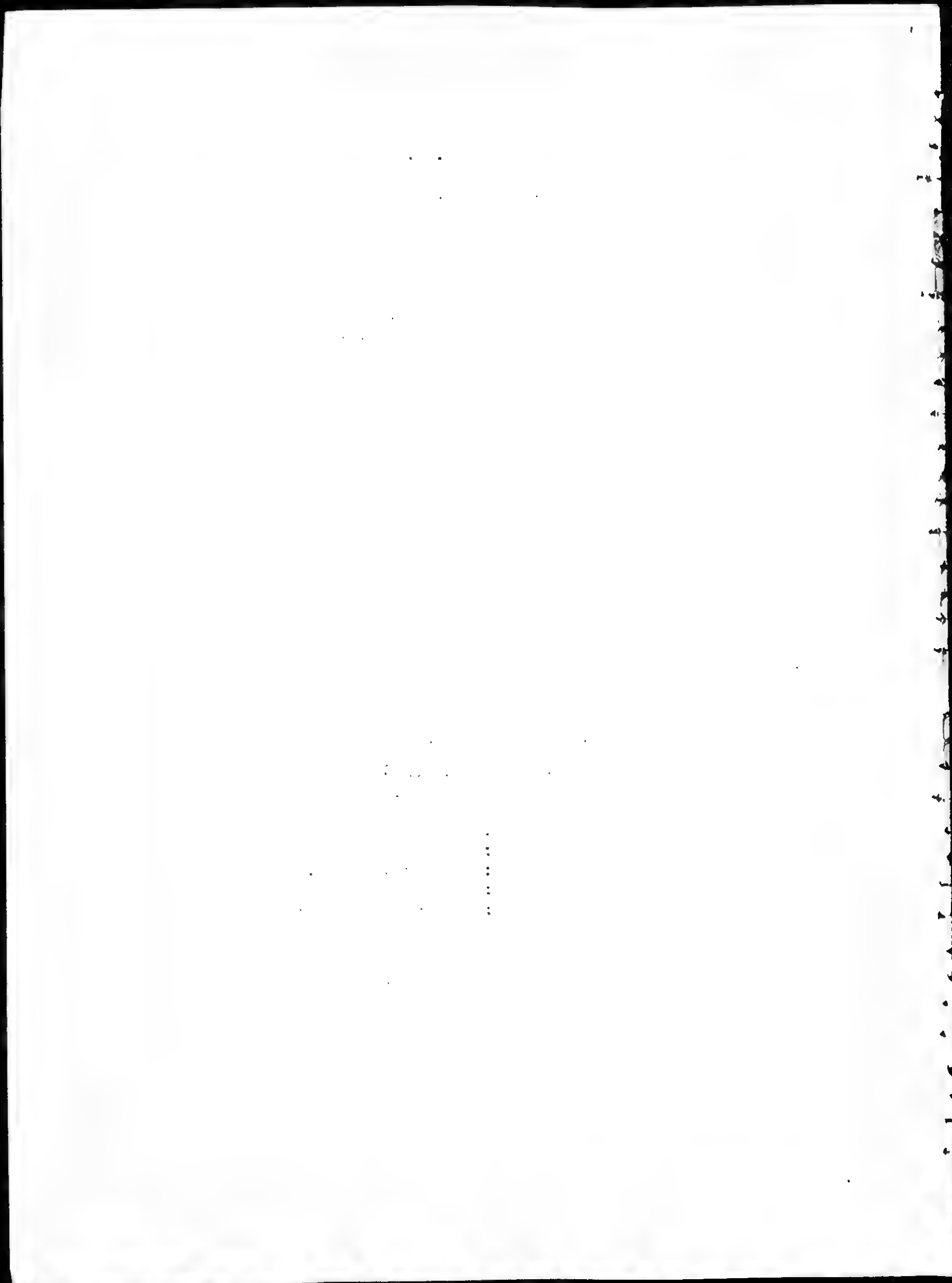
Criminal No. 600-63

Filed April 20, 1964

MOTION FOR MISTRIAL

Now come the defendants and move the Court for a mistrial in this cause and call attention to newspaper article appearing in the Washington Daily News on Saturday, April 18, 1964, copy of which is annexed hereto and made a part hereof.

Defendants desire to point out that the article in question is different from the ordinary newspaper article in that the remarks of the



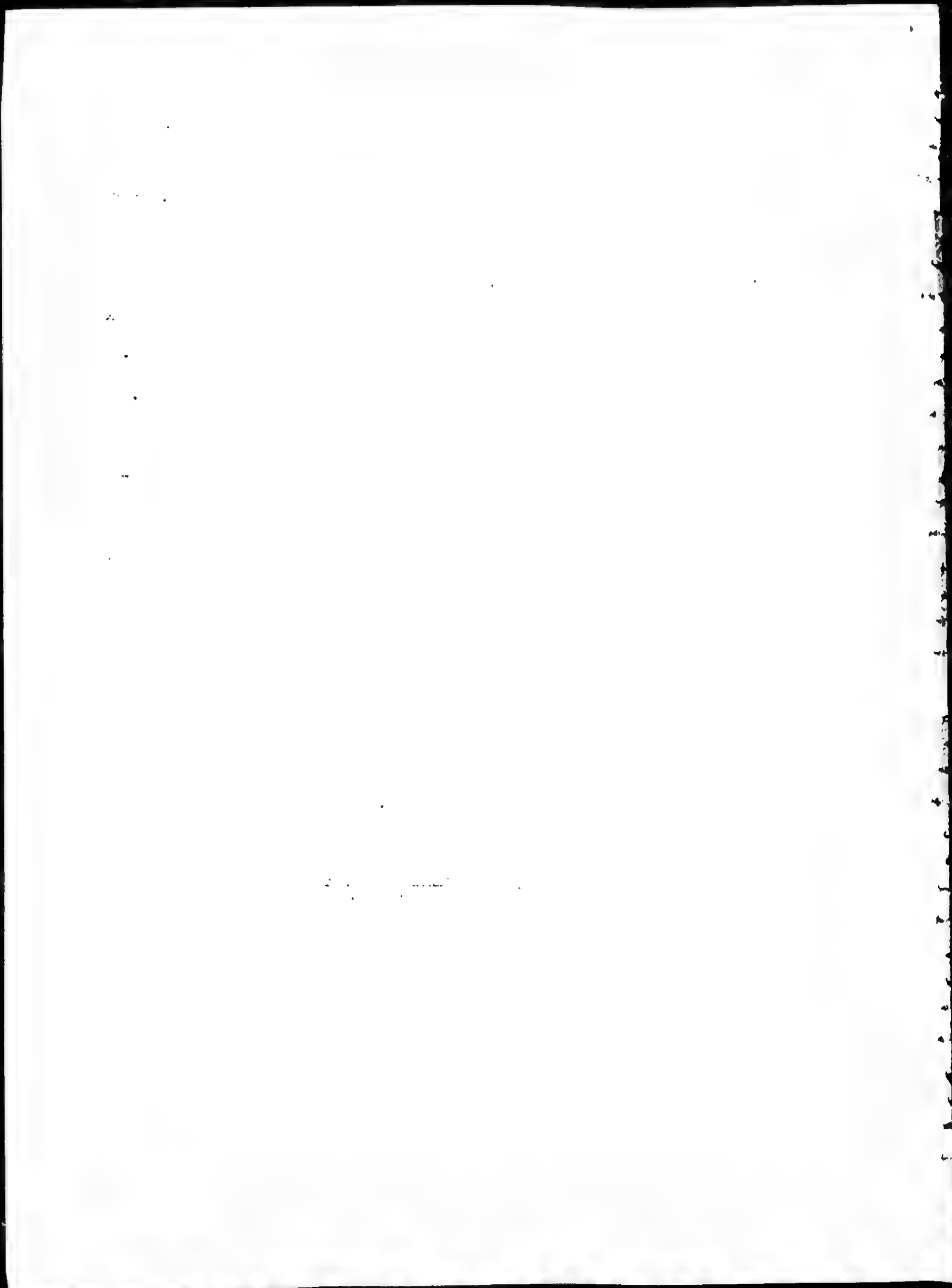
trial judge -- in violation of the statute -- caused the publication. Hence it is our opinion that the harm can only be undone by the declaration of a mistrial. It must never be overlooked that contests between judge and counsel are always unfortunate. The contestants are not evenly matched and the judge always has the upper hand. In the event the court will not declare a mistrial request is made that the jurors be individually polled.

The statute -- Title 28, Section 144 -- sets forth that the trial judge must accept the facts as true and can only pass upon the legal sufficiency of the affidavit of bias and prejudice. The trial judge in this case engaged in a controversy with the affiant (defendant herein) and refused to withdraw the remark upon request but in fact reemphasized it. Accordingly there is also annexed hereto supplemental affidavit of affiant.

Wherefore it is requested that the trial judge forthwith declare a mistrial.

/s/ James J. Laughlin
James J. Laughlin
National Press Building

/s/ William J. Garber
William J. Garber
412 5th Street, N. W.
Washington, D. C.
Counsel for Defendants



WASHINGTON DAILY NEWS, April 18, 1964

Lawyer on Trial
JUDGE DISPUTES LAUGHLIN CHARGES

By J. W. Maxwell

Judge George L. Hart, Jr. yesterday refused to disqualify himself in the trial of lawyer James J. Laughlin, who is charged with obstructing justice.

Mr. Laughlin charged that the Judge was biased against him. He said Judge Hart "approached" him in the National Press Bldg. after he was appointed District Judge in 1958 and asked him to testify in his behalf in Senate hearings. He testified but mostly against Judge Hart, and the judge has been prejudiced against him ever since, Mr. Laughlin said.

DENIAL

Judge Hart told Mr. Laughlin his statement was false - he never approached him. Also, the judge said, Mr. Laughlin's motion was too late.

If he had been asked to disqualify himself before the trial started, Judge Hart said, even without a stated reason, he would have.

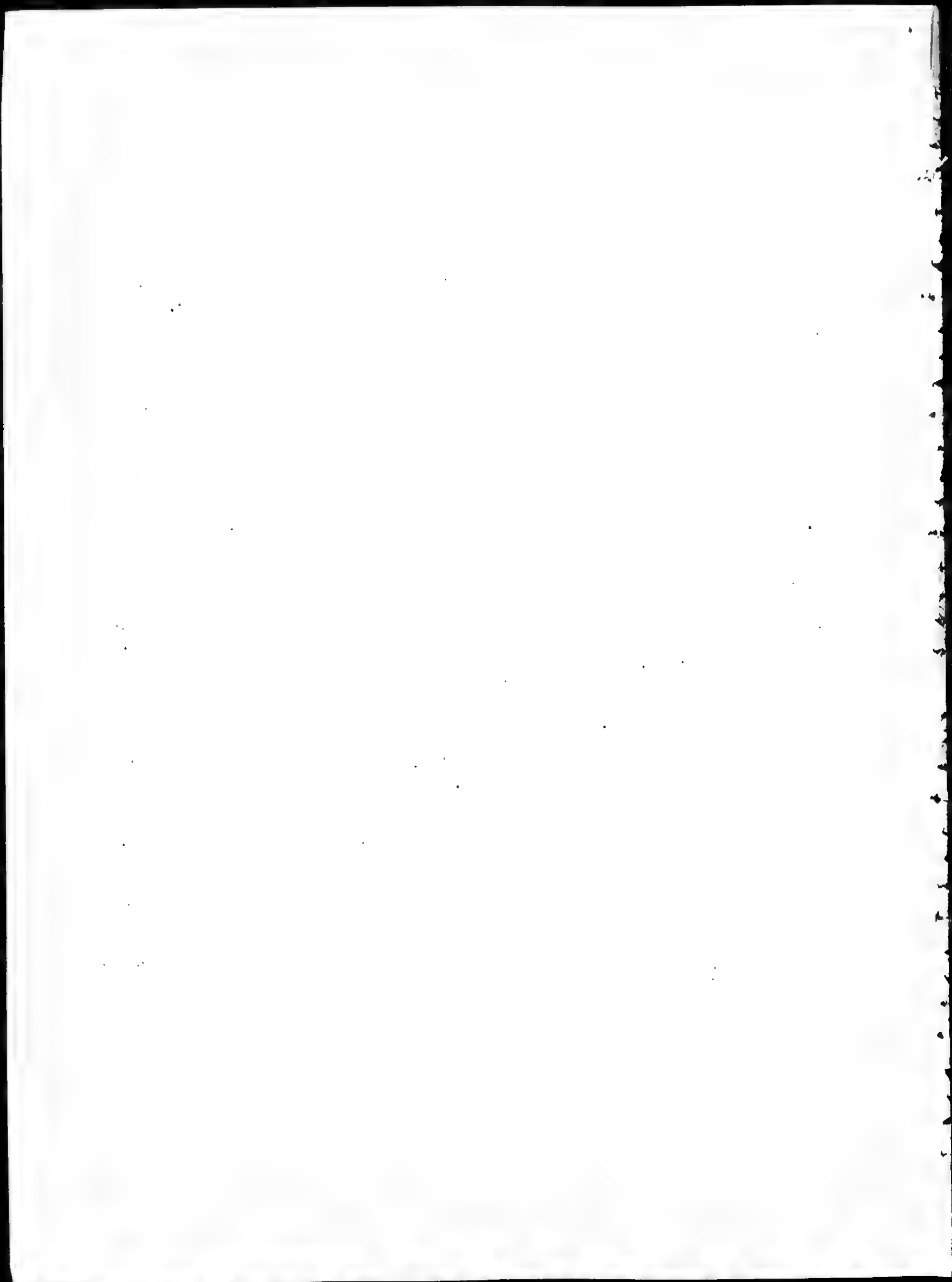
Mr. Laughlin and Allan U. Forte are charged with trying to influence and buy off a witness in Forte's trial in 1963 on charges of performing an abortion on a Catonsville, Md. housewife. Yesterday the housewife testified she was contacted by a former Baltimore policewoman on Forte's behalf and urged to write to prosecutors and say she didn't want to testify. She was given money and gifts, she testified.

When the letters didn't get the trial off, the housewife testified, she was told to say she couldn't identify Forte. But she could and did identify him, she said.

The former policewoman will be on the witness stand when the trial resumes Monday.

Yesterday she testified she contacted the housewife for Forte and was guided in her actions by Mr. Laughlin.

Forte met her several times, she said, and gave her money for herself and for the housewife.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ALLAN U. FORTE, et al.

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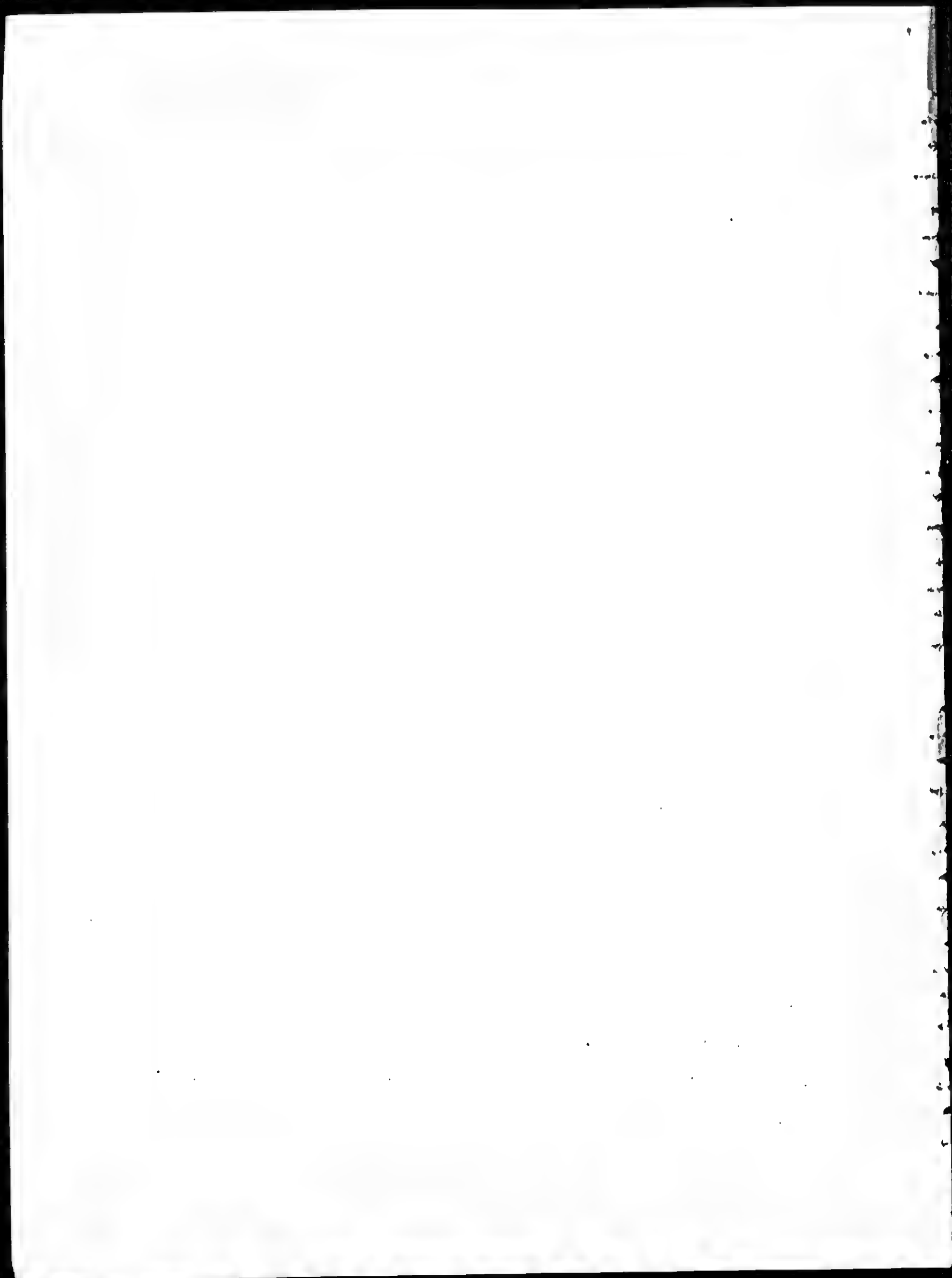
Criminal No. 600-63

Filed April 23, 1964

MOTION FOR MISTRIAL

Now come the defendants and move the Court for a mistrial in this cause for the following reasons:

1. Since the trial began, the trial judge has not only shown deep and noticeable hostility toward the defendants but he has hindered and hampered the defendants in the cross examination of the witnesses and has used every means at his command to block any reference to Sergeant Wallace which would tend to place Wallace in his proper setting -- that is to say, any evidence that would show that Wallace had coached witnesses before their appearance before the Grand Jury. It has been brought to the attention of the trial judge that the said Wallace had been accused in the courtroom of Judge Tamm of soliciting a bribe from the defendant Forte. This triggered the inquiry resulting in the present indictments. The Court well knows that one of the purposes of the indictment was to determine whether the said Wallace had solicited the defendant Forte for a bribe. Instead of a bona fide and honest investigation to determine the facts, the said Wallace was virtually permitted to take over the investigation and to investigate himself. It is also well known that the said Wallace assisted in arranging for a recording of defendant's (Laughlin's) conversations in violation of the Federal Communications Act. In short, the judge has come to the rescue of the Police Department and has intervened repeatedly to prevent Wallace's role in this case to be known.



2. The trial judge, since the beginning of the trial, has shown his hostility by his demeanor and facial expressions. He has given indication that he will leave no stone unturned to bring about the conviction of the defendants and will at all times endeavor insofar as he can to prevent evidence reaching the jury favorable to the defendants. His manner has been one of sarcasm. He evinces displeasure when a request is made by defense counsel and evinces great pleasure when any request is made by the Assistant United States Attorney. It is well to point out that this has gone on repeatedly since the beginning of the trial and has continued up to the present time -- that is to say, up until the recess at 12:20 P.M., April 23, 1964.

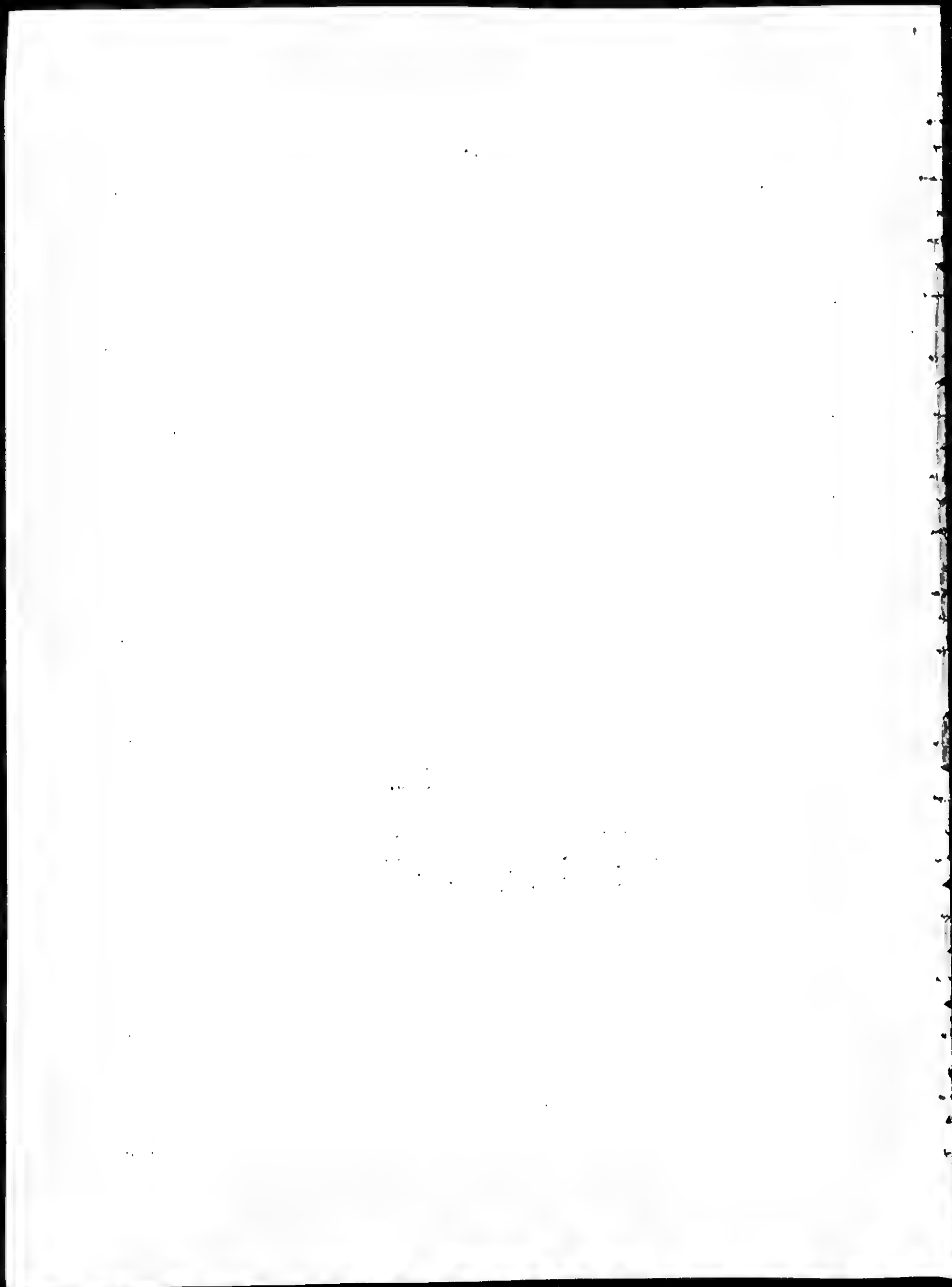
/s/ William J. Garber
William J. Garber
Counsel for Defendant
James J. Laughlin

/s/ James J. Laughlin
James J. Laughlin
Counsel for Defendant
Allan U. Forte

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed April 27, 1964

The following instructions were tendered to the court. It will be seen that all of them were denied with the exception of prayer numbered 30. It will be noted that prayer numbered 19 was modified by the court to the detriment of the defendants. We have set forth the prayer as tendered and the prayer as given by the court. The record clearly shows that objection was made to the denial of the prayers and objection made to the modifications:



"DEFENDANT'S INSTRUCTION NO. 1

To find the defendants guilty of the conspiracy charge in Count 1, the Government must prove beyond a reasonable doubt that it was a part of the conspiracy that the defendants Allan U. Forte and James J. Laughlin did unlawfully, willfully and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown, to defraud the United States and to violate the following sections of the United States Code:

Section 1503, Title 18 (Influencing Witnesses);
Section 1621, Title 18 (Perjury);
Section 1622, Title 18 (Subornation of Perjury);

and the Government must also prove beyond a reasonable doubt that the said defendants Allan U. Forte and James J. Laughlin, Bernice Gross and others did corruptly endeavor to influence Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial and, if she did not absent herself, then, to testify falsely to the aforesaid matters at the said trial in United States v. Allan U. Forte, Criminal No. 741-61.

DEFENDANT'S INSTRUCTION NO. 2

A mere meeting between the defendants cannot be construed as the beginning of a conspiratorial relationship.

DEFENDANT'S INSTRUCTION NO. 3

In other words, in considering whether or not one or both defendants on trial was or were members of the conspiracy charged, you must do so without regard to, and independently of, the statements, acts and declarations of others in his absence.

DEFENDANT'S INSTRUCTION NO. 4

Mere association or acquaintanceship of one defendant with another does not establish the existence of a conspiracy.

DEFENDANT'S INSTRUCTION NO. 5

Mere association of one of the defendants with the other defendant, or a co-conspirator, does not establish the existence of the conspiracy or the participation of either or both therein.

DEFENDANT'S INSTRUCTION NO. 6

The Government must prove beyond a reasonable doubt that the purpose of the conspiracy was to obstruct the due administration of justice in connection with an investigation pending before a Federal grand jury in this district.

THE
LIBRARY OF THE
UNIVERSITY OF CHICAGO
CHICAGO, ILL.
1911

DEFENDANT'S INSTRUCTION NO. 7

There are a number of steps which you must follow in order to determine whether one or both of the defendants were members of a conspiracy. First, you must find that there was a conspiracy. A conspiracy has been defined as a corrupt agreement or a partnership in crime. Second, you must consider all the evidence directly relating to each defendant in order to determine whether he was a member of such a conspiracy. In determining whether he was a member or not you cannot consider any conversations which were had when he was not present. In determining whether he was a member you cannot consider any acts done by others in his absence. Third, only if you find beyond a reasonable doubt that a conspiracy existed and that one or both of the defendants were members of this conspiracy can you consider conversations of and acts done by the defendant or defendants whom you find to be a member or members of the conspiracy or alleged co-conspirators against such absent defendant.

DEFENDANT'S INSTRUCTION NO. 8

The jury is instructed that in determining whether the defendant Laughlin was a member of the conspiracy, if in fact you find such a conspiracy existed, you are instructed as a matter of law that his membership in the alleged conspiracy cannot be proved against him by evidence consisting of only the conduct and statements of his alleged co-conspirators, Gross and Forte, in his absence, and if you have a reasonable doubt about this you must give the benefit of this doubt to the defendant and find him not guilty on this count.

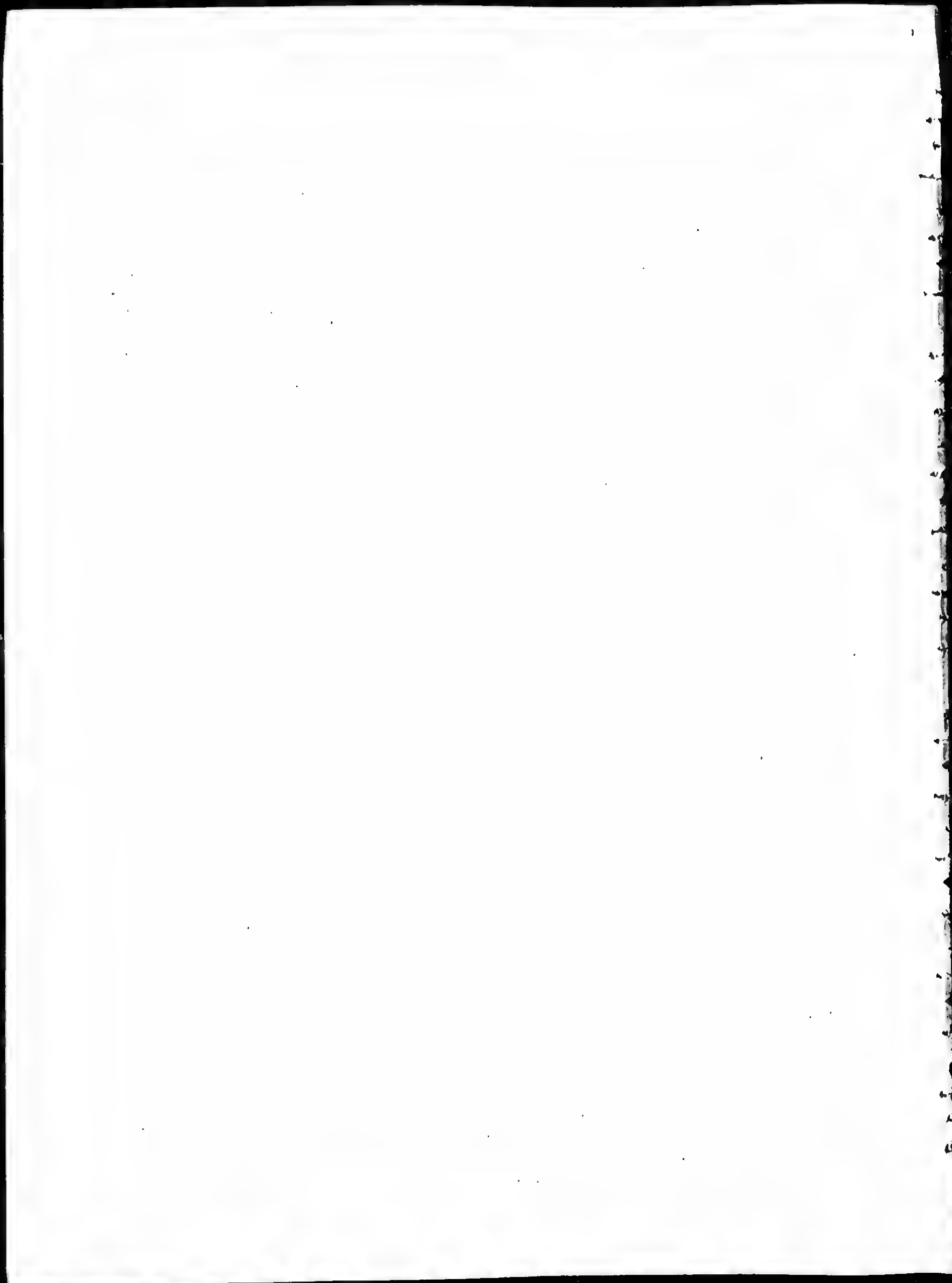
DEFENDANT'S INSTRUCTION NO. 9

I want to caution you that mere association with one or more conspirators does not make one a member of the conspiracy. Nor is knowledge of the conspiracy, without participation therein, sufficient to constitute membership. What is necessary is that a defendant knowingly participate with knowledge of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends and if you have a reasonable doubt from all the evidence as to whether the Government has established all of these matters, then the Government would not have sustained its burden of proving that defendant was a knowing member of a conspiracy and it would be your duty to find him not guilty on that count.

DEFENDANT'S INSTRUCTION NO. 10

The jury is instructed that individuals, including the defendants, associated with each other by personal meetings, by telephone conversations and written communications does not in and of itself establish their participation in a criminal conspiracy.

To establish participation in a criminal conspiracy it is necessary to prove beyond a reasonable doubt that the particular defendant knowingly and willfully joined in a criminal partnership and that the illegal and criminal purpose of that partnership was known by him and that he intended to further that purpose.



Even if you find that a criminal conspiracy existed, you must still determine whether each defendant willfully participated in it. It is not enough merely to find that any of the acts of that defendant furthered the object of the alleged conspiracy. If the defendant unwittingly served as a means to accomplish the object of the unlawful agreement or, with respect to the defendant Laughlin in properly representing his client some of his acts may have, unknown to Mr. Laughlin, furthered the objects of the conspiracy, that would be insufficient to convict the defendant and you would be required to acquit him on the conspiracy count and if you have a reasonable doubt about it, you would have to give him the benefit of that doubt and find him not guilty.

DEFENDANT'S INSTRUCTION NO. 11

To find either defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of a co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy.

DEFENDANT'S INSTRUCTION NO. 12

You are instructed that if you find that every circumstance relied upon as incriminating is susceptible of two interpretations, each of which appears to be reasonable, and one of which points to a defendant's guilt, the other to his innocence, it is your duty to accept that of innocence and reject that which points to guilt.

Delli Paoli v. United States
352 U.S. 232; 77 S.Ct. 294

DEFENDANT'S INSTRUCTION NO. 13

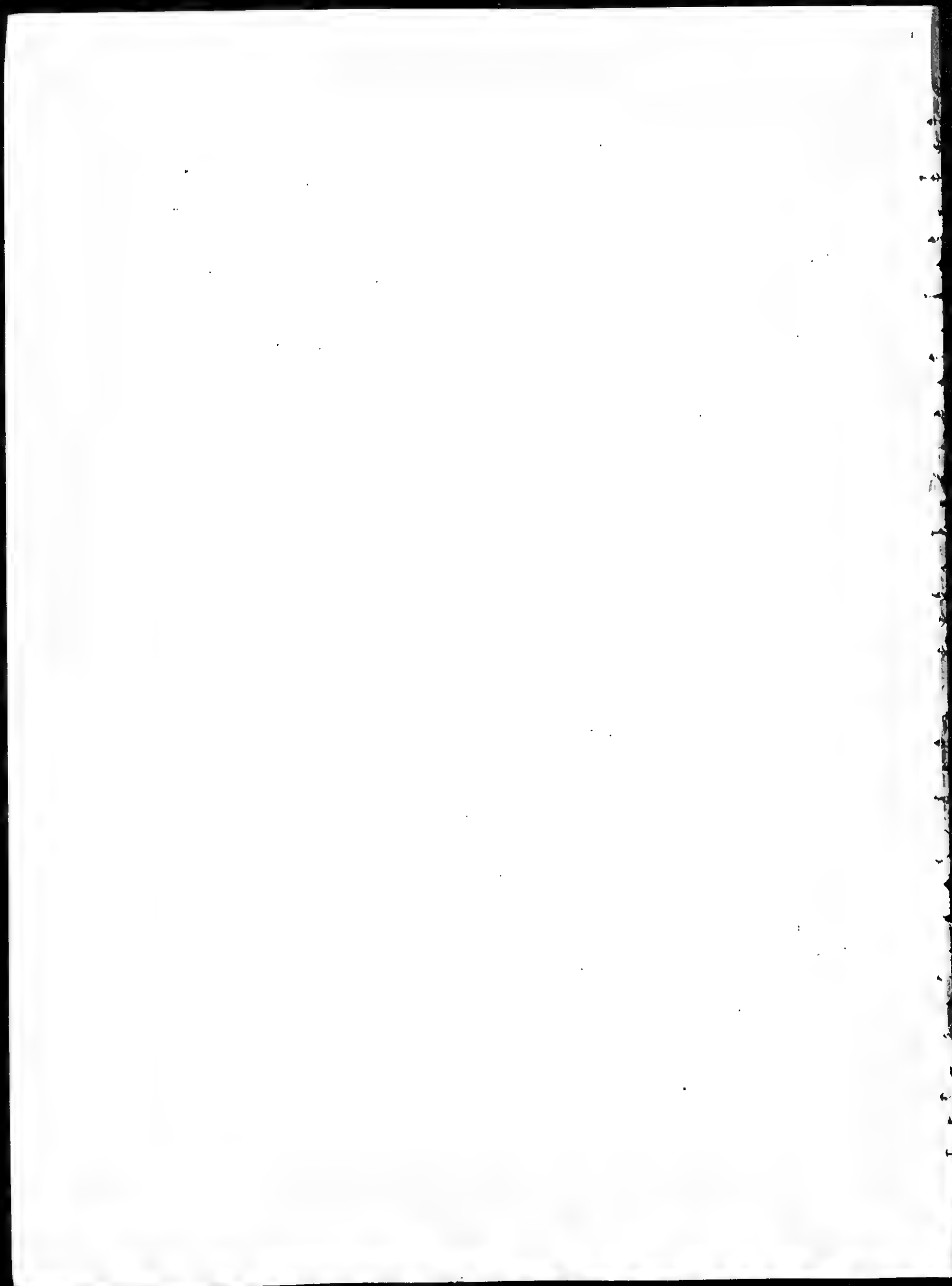
You are instructed that any admission made by the co-conspirator Gross on or after March 1, 1963 can be considered by you only in connection with the participation of the co-conspirator Gross and cannot be used against the defendant Laughlin.

In this connection it is necessary to instruct you as to why such an admission against interest made by a conspirator or co-conspirator cannot be used against the others. It is as the law describes it, an admission against interest which a person ordinarily would not make. However, if such a person after the termination of the conspiracy and his or her appearance before a grand jury implicates other defendants or conspirators in such admission, it is not evidence against the others because as to the other defendants it would be nothing more than hearsay evidence.

Delli Paoli v. United States
352 U.S. 232; 77 S.Ct. 294

DEFENDANT'S INSTRUCTION NO. 14

You are further instructed that the Government has the burden of proving beyond a reasonable doubt that the defendant joined the overall



conspiracy charged in the indictment with knowledge of its common, unlawful objective and with the specific intention to assist the conspiracy to achieve its wrongful goal. Where a defendant associates with persons engaged in conspiracy that association per se, by and of itself, does not make a defendant a co-conspirator. Even if the defendant participates in a single isolated illegal transaction with persons who are engaged in a conspiracy, that participation per se, by and of itself, does not make the defendant a co-conspirator. Therefore, after viewing all of the evidence you find that the defendant Laughlin did not knowingly participate in a conspiracy to obstruct justice or if you find that his participation was limited in this case in advising the admitted co-conspirator Gross about the contents of a certain letter, that would be insufficient to denominate the defendant a conspirator and you would be required to find him not guilty on that count.

DEFENDANT'S INSTRUCTION NO. 15

The jury is instructed that all evidence of an admitted perjurer should be considered with caution and weighed with great care.

DEFENDANT'S INSTRUCTION NO. 16

The jury is instructed that if and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

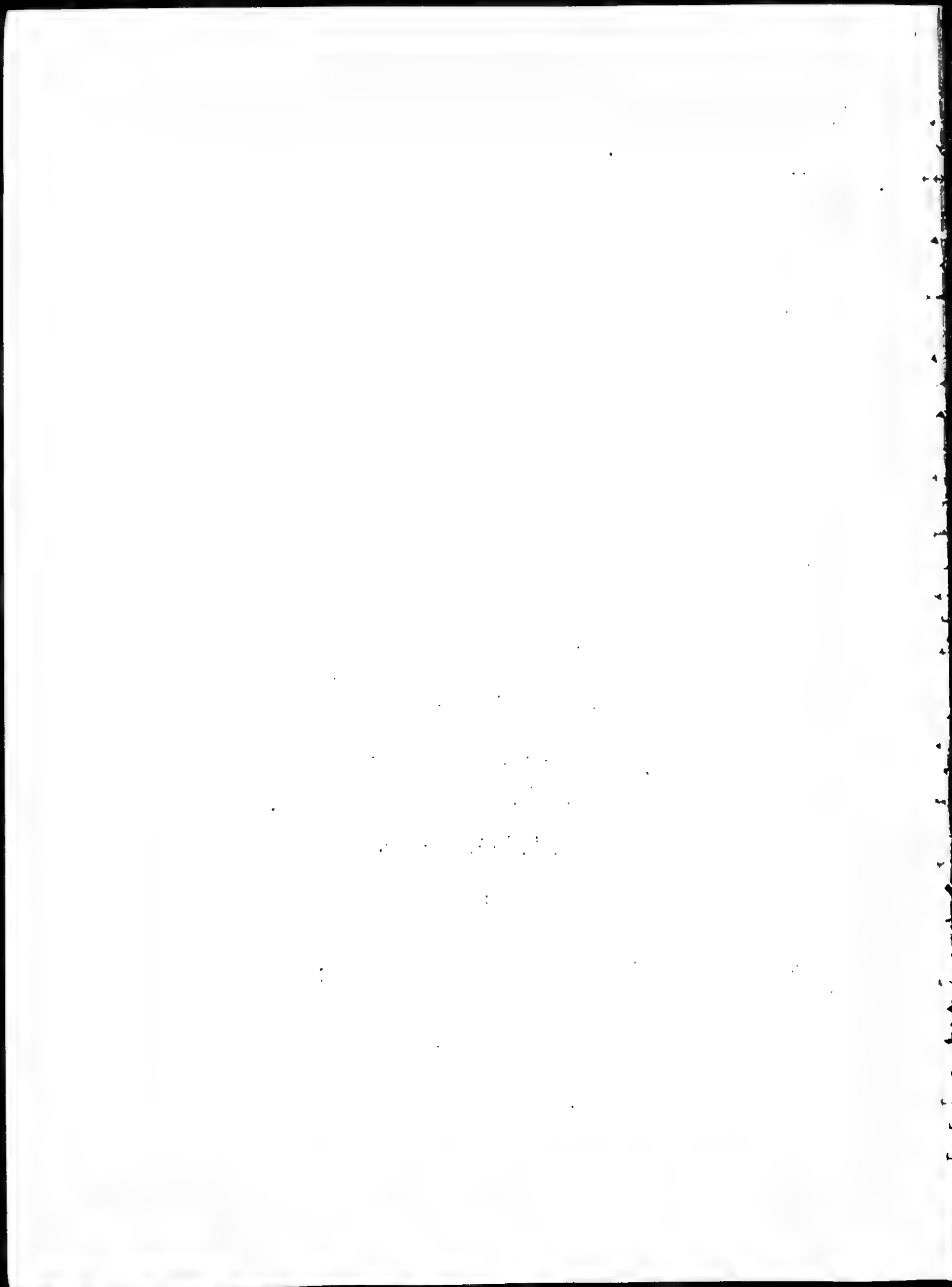
Otherwise, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and heard the statement made.

DEFENDANT'S INSTRUCTION NO. 17

In connection with the testimony of the witness Bernice Gross, you are instructed that she has testified that she was interrogated for several hours in the office of Assistant United States Attorney Hannon and that she was fearful that if she did not cooperate with the United States Attorney she would be indicted for perjury. Therefore, it is for you to consider whether the testimony of the said Gross, in view of her testimony on the stand in this case, is entitled to any credence whatsoever.

DEFENDANT'S INSTRUCTION NO. 18

You are instructed of course that it is essential that the Government prove each and every allegation in the indictment.



DEFENDANT'S INSTRUCTION NO. 19

You are instructed that an attorney on behalf of a defendant not only has the right but it is his plain duty toward his client to fully investigate the case and to interview and examine as many as possible of the witnesses involved who could assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties, and should not be partisan. They do not belong to either side of the controversy. They may be summoned by one or the other or by both but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous.

The defendant James J. Laughlin as attorney for the defendant Allan U. Forte was under duty and obligation to properly investigate the facts and to interview any and all persons who might have any knowledge or could shed any light on the allegations in the indictment.

State v. Papa"
80 Atl. 12.

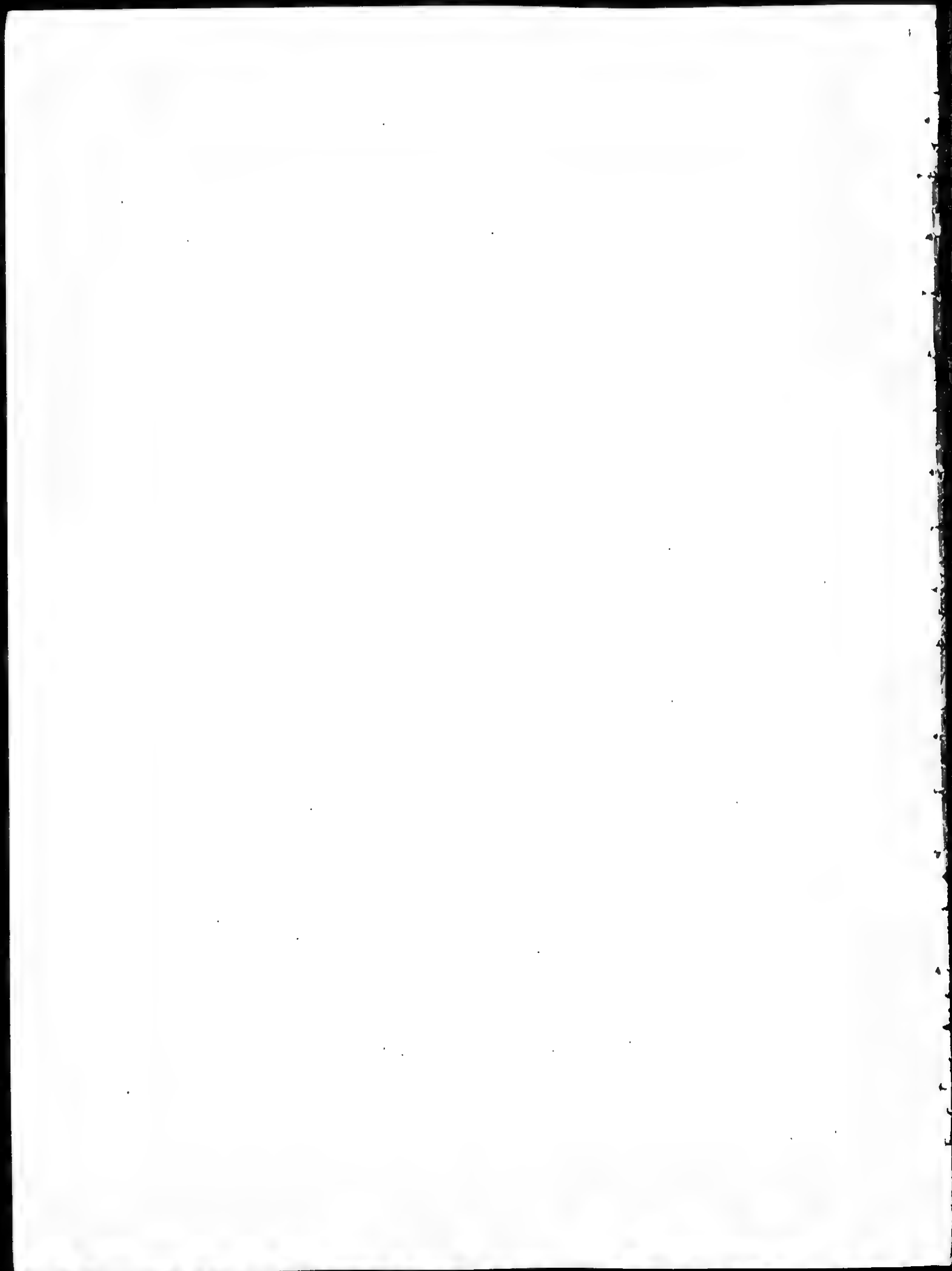
The above instruction (Defendant's Instruction No. 19) was emasculated by the trial judge when he altered the instruction to read as follows:

"You are instructed that an attorney on behalf of a defendant not only has the right but it is his plain duty toward his client to fully investigate the case and to interview and examine as many as possible of the witnesses involved who could assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties and should not be partisan. The defendant James J. Laughlin as attorney for the defendant Allan U. Forte was under duty and obligation to properly investigate the facts and to interview any and all persons who might have any knowledge or could shed any light on the allegations of the indictment. A lawyer representing a client in a case pending before the court does not have the right to conspire with anyone to influence a witness not to give testimony in a pending case or to influence a witness to testify falsely in a case." (Underlining ours.)

We continue with the following instructions of the defendants:

"DEFENDANT'S INSTRUCTION NO. 20

You are instructed that if an attorney does not properly investigate the case and does not adequately represent his client he may run the risk of condemnation by an appellate court or criticism or disciplinary action by the trial court.



DEFENDANT'S INSTRUCTION NO. 21

You are instructed that there is on the statute books a provision known as Section 2255 of the New Judicial Code. This section permits an accused, if convicted, to petition the Court for relief if he contends that his constitutional rights were violated. The accused, of course, under our system of Government is entitled to effective assistance of counsel. If an accused makes an accusation that he did not have effective assistance of counsel due to inaction or carelessness on the part of his counsel, the Court can order a hearing and at such hearing the attorney could be required to testify. Therefore, it is necessary that an attorney for a defendant be always alert to make certain that the constitutional rights of his client are fully protected.

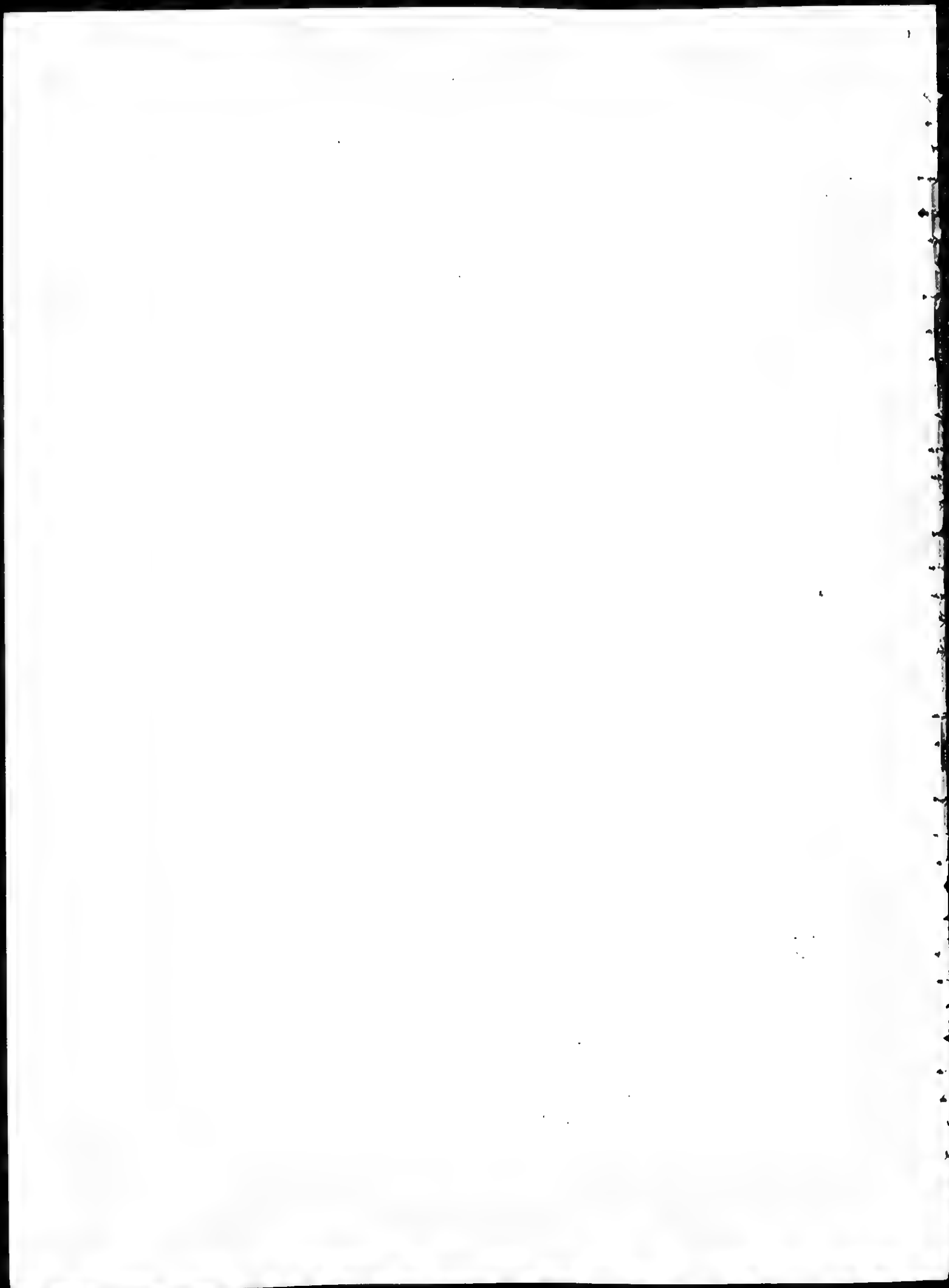
DEFENDANT'S INSTRUCTION NO. 22

The defendants Allan U. Forte and James J. Laughlin are accused of conspiring to violate Section 371 of the United States Code. In other words, the Government maintains that they conspired to obstruct the due administration of justice. The Government must prove beyond a reasonable doubt that the defendants Allan U. Forte and James J. Laughlin conspired to obstruct the due administration of justice, and if you have a reasonable doubt about this you must give the benefit of this doubt to the defendants and find them not guilty.

DEFENDANT'S INSTRUCTION NO. 23

The jury is instructed that there has been testimony in this case that the witness Smith did not wish to come to Court in the case involving the defendant Allan U. Forte and that she communicated said thoughts to a Bernice Gross. There has also been testimony in the case from the alleged co-conspirator Gross that the defendant Laughlin suggested certain matters that could be put in a letter to the United States Attorney suggesting that the said Smith did not wish to appear as a witness. This testimony was received with relationship to Count 1.

The jury is instructed that Mrs. Smith, as the complaining witness, had the right to communicate her desire not to testify to the United States Attorney and Mr. Laughlin, as attorney for the defendant Forte, had the right and duty to advise said witness that she could communicate her views to the United States Attorney and that she could do so by letter and that this advice, standing alone, would not constitute any offense by the defendant Laughlin. The jury is instructed the Government would have to go further and would have to prove beyond a reasonable doubt that Mr. Laughlin did give advice with a corrupt intent as this Court has defined that term to you, and if from all the evidence you believe that Mr. Laughlin advised the complaining witness through Gross about the writing of a letter to the United States Attorney but he did so in the representation of his client and that he was exercising his right to advise the complaining witness that she could communicate her views to the United States Attorney and did so without any criminal intent or corrupt motive, then you would have to find the defendant Laughlin not guilty and if you have a reasonable doubt about this you would have to give him the benefit of that doubt and find him not guilty.



Rosner v. United States
2nd Circuit
10 F. 2d 675

Harrington v. United States
8th Circuit
267 Fed. 97

DEFENDANT'S INSTRUCTION NO. 24

You are instructed that the indictment also charges that the defendants Allan U. Forte, James J. Laughlin, Bernice Gross and other co-conspirators did endeavor to corruptly influence one Dorothy Birge by counseling, advising, suggesting, and persuading her to testify falsely to the matters set forth in Criminal Case No. 741-61, United States v. Allan U. Forte, terminating in an acquittal February 20, 1963, wherein Jean Smith was the complaining witness.

Before you could convict in this case you would have to believe beyond a reasonable doubt that the defendants Allan U. Forte and James J. Laughlin and Bernice Gross and other co-conspirators did corruptly endeavor to influence the said Dorothy Birge by counseling, advising, suggesting, and persuading her to testify falsely in Criminal No. 741-61, United States v. Allan U. Forte, terminating in an acquittal February 20, 1963. If you have a reasonable doubt about this you must give the benefit of that doubt to the defendants and acquit them.

DEFENDANT'S INSTRUCTION NO. 25

You are instructed that in this case Bernice Gross has admitted under oath that she has committed many, many acts of perjury. You are instructed that in view of this you have the right to completely disregard all of her testimony.

Arbuckle v. United States
79 U.S.App.D.C. 282, at p. 284.

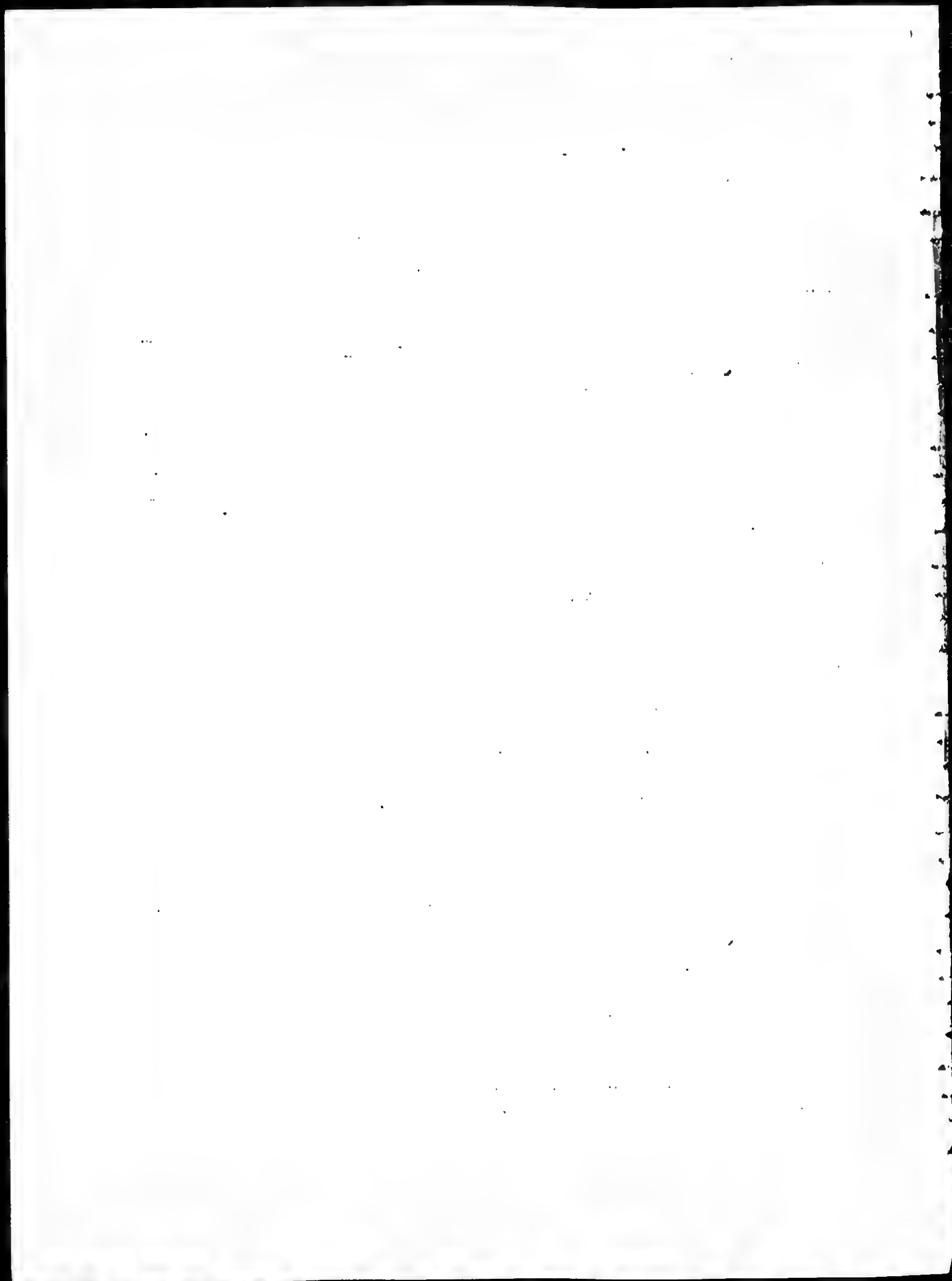
DEFENDANT'S INSTRUCTION NO. 26

You are instructed as a matter of law that the burden of proof is always upon the prosecution. It is not sufficient to establish a probability though a strong one, arising from the doctrine of chance, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact beyond a reasonable doubt.

McAffee v. United States
70 App.D.C. 142 at p. 151.

DEFENDANT'S INSTRUCTION NO. 27

You are instructed that specific criminal intent must exist in order for there to be a violation of Section 1503, Title 18, United States Code (Obstruction of Justice) and such specific criminal intent must be to do some act which tends to influence, obstruct or impede due administration



of justice and must be done with corrupt motive and if you have a reasonable doubt as to whether the Government has proven beyond a reasonable doubt this specific criminal intent and this corrupt motive and if you have a reasonable doubt as to whether the Government has sustained its burden of proof as to such specific criminal intent or corrupt motive, you must give the benefit of that doubt to the defendants and acquit them.

Knight v. United States
310 F.2d 305.

DEFENDANT'S PRAYER NO. 28

You are instructed that the recorders played in this courtroom to be received as evidence must have been willingly made - in other words - if the consent of Bernice Gross was not voluntarily given you must erase from your minds such testimony. The Federal Communications Act requires that the consent must be voluntary.

DEFENDANT'S PRAYER NO. 29

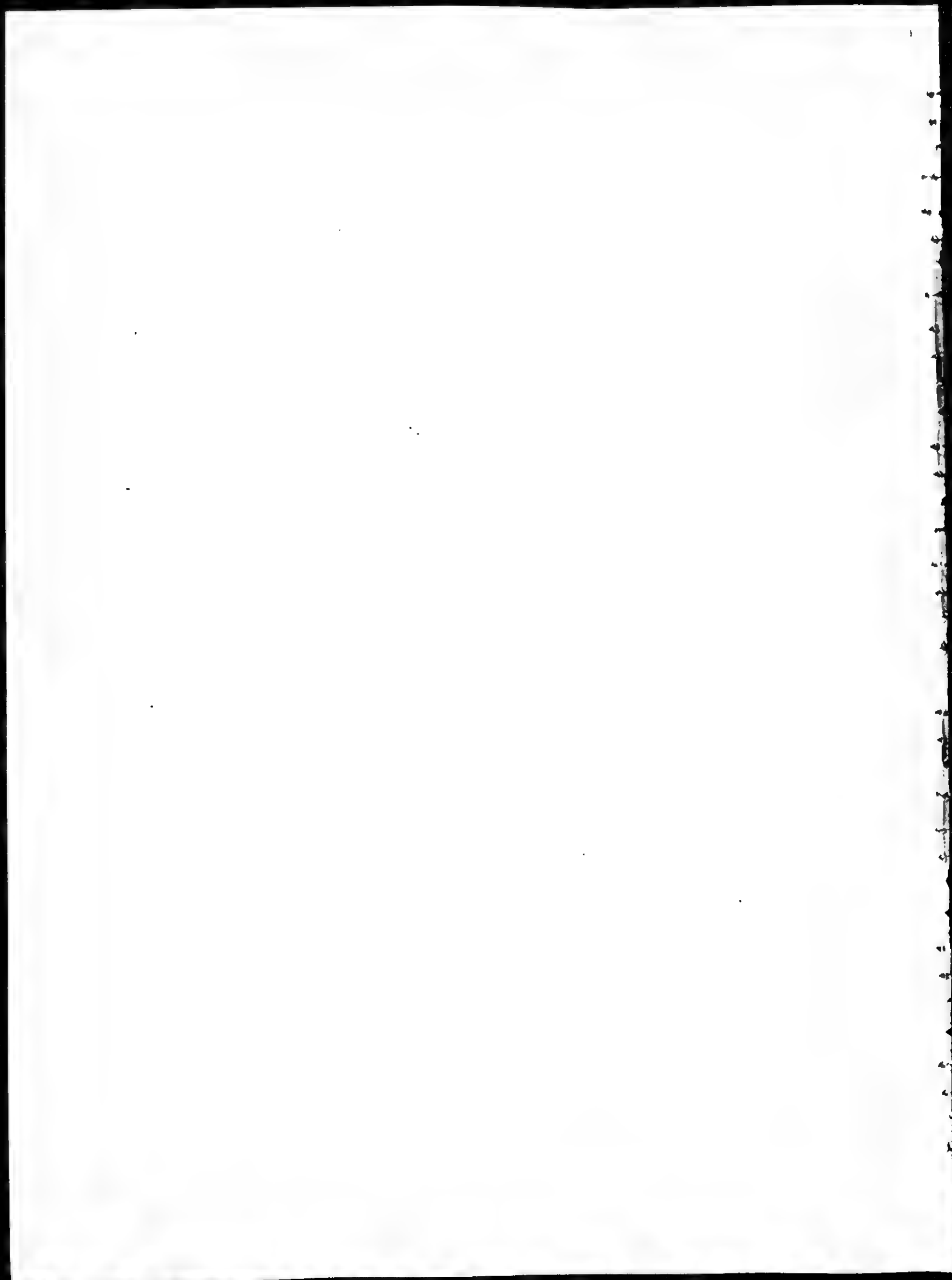
You are instructed that the government has failed to call as a witness one Samuel E. Wallace, a police officer of the District of Columbia, who played a major part in the investigation of this case. Since the said Wallace was peculiarly available to the government you have a right to infer that the testimony of the said Wallace if called would have been unfavorable to the government.

DEFENDANT'S PRAYER NO. 30

You have already been instructed that the testimony of Bernice Gross, an admitted perjurer should be considered with caution and weighed with great care. You are further instructed that you may consider whether she still is in fear and whether she expects leniency at the hands of the United States Attorney's office and whether such fear affects her testimony in this case." (This prayer numbered 30 was substantially granted.)

"DEFENDANT'S PRAYER NO. 31

You are instructed that a reasonable doubt may arise from the evidence in the case and you are also instructed that a reasonable doubt may arise from lack of evidence."



Charge to the Jury

April 29, 1964

P R O C E E D I N G S

DEPUTY CLERK: Case of Allen U. Forte and James J. Laughlin.

MR. GARBER: Your Honor, before the jury is brought in, I was in Assignment Court this morning and Judge McGuire sent a case in which I am counsel to Judge Tamm which I am to start after proceedings here terminate, and I wonder if your clerk could call Judge Tamm's court and perhaps give him an approximate idea as to how long I'd be here. Of course, the judge may not be aware of the fact that I am up here.

THE COURT: You can tell him you will probably be here approximately an hour.

MR. GARBER: Thank you.

(The deputy clerk made a brief phone call.)

THE COURT: Is that taken care of?

DEPUTY CLERK: Yes, sir.

THE COURT: Bring the jury in.

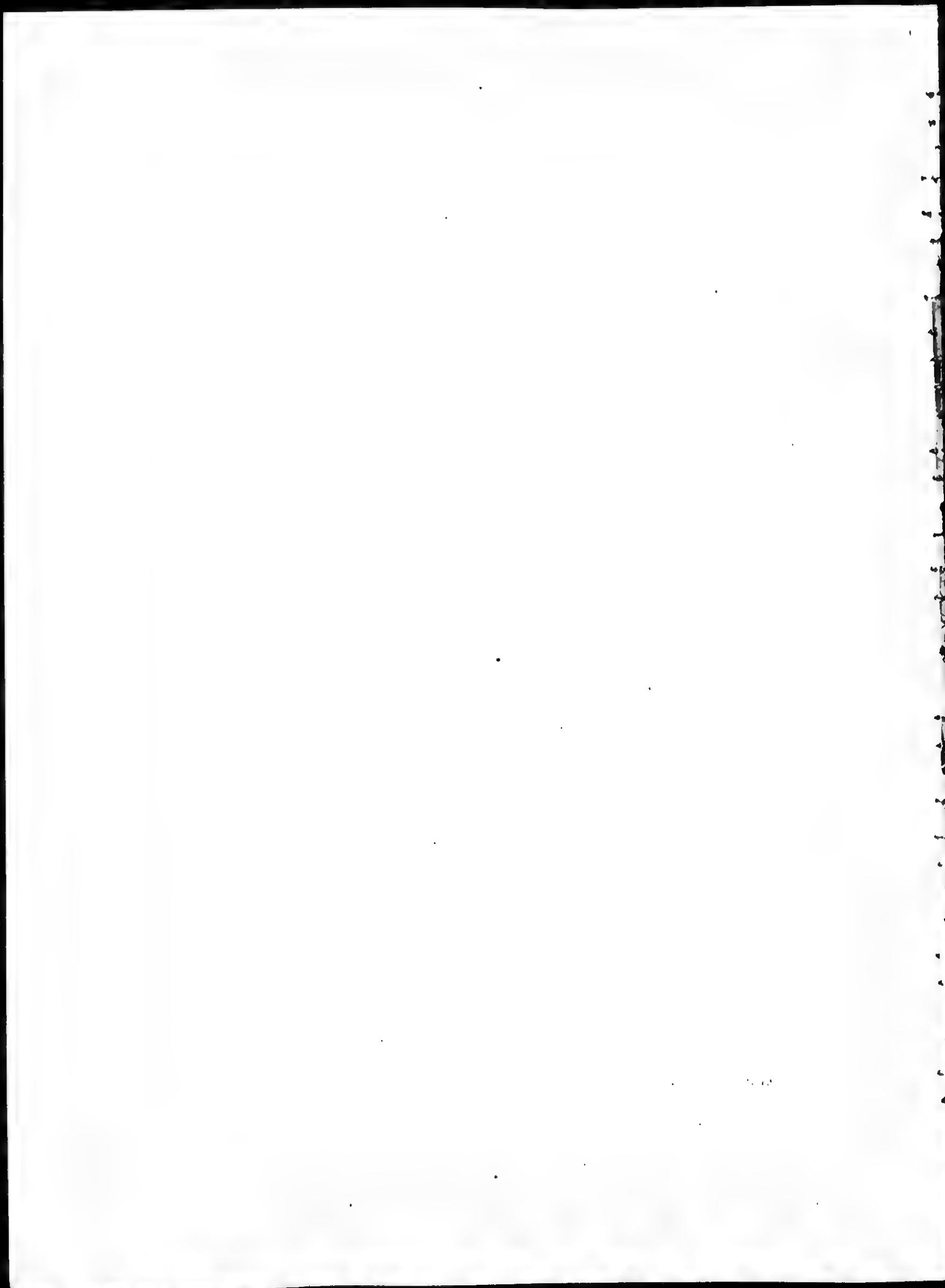
(The jury was brought in and the following proceedings were had:)

JURY CHARGE:

THE COURT: Ladies and gentlemen of the jury, this case has now reached that stage where it becomes my duty to charge you on the law of the case, which charge you are required to follow in exercising your duty to pass on the facts of the case.

Before going into the principles of law which must guide you in your deliberations, I will discuss briefly the participants in this trial and the function which each of us has.

Let us consider first counsel for the Government. You first met counsel for the Government in his opening statement. The Government's



attorney made an opening statement as to what the Government expected to prove. These statements as to what counsel for the Government expected to prove do not constitute evidence in the case.

At the close of the case, counsel for the Government and counsel for the Defendants made what we refer to as summations to the jury. They, of course, did not undertake to discuss all of the evidence in the case but they did discuss certain of the evidence that constituted their recollection of that part of the evidence which they thought you should give special consideration to.

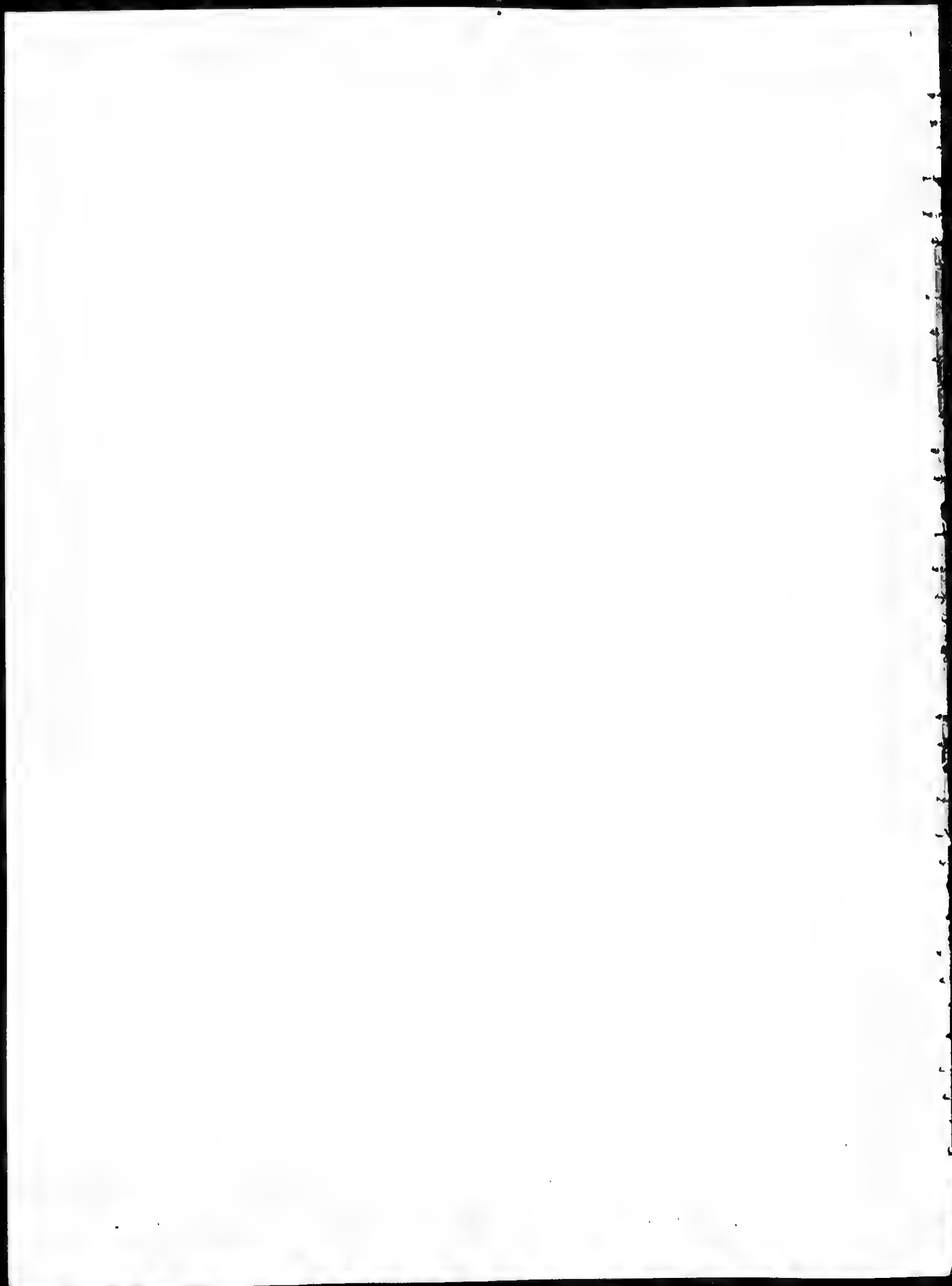
If your recollection of the evidence disagrees with their recollection of the evidence, your recollection of the evidence is controlling as you are the sole judges of the issues of fact.

During the course of the trial there were occasions when there were colloquies between counsel and between counsel and the Court, in connection with which there may have been statements of alleged fact. Quite obviously, these statements do not constitute evidence.

As to the function of the Court, it is my duty to conduct the trial of the case in an orderly and efficient manner and to rule upon questions of law during the course of the trial and finally, to charge you with respect to the law which will control you in the determination of the issues of fact which you have to decide.

You are not to draw any inference, nor are you to be influenced with respect to the guilt or innocence of the defendants, or either of them, by any ruling of this Court during the course of the trial. The court made rulings of law and thereby disposed of the questions that were presented either dealing with the admissibility or the inadmissibility of evidence, or other questions, that arose during the course of the trial.

There is nothing that the Court has said during the course of



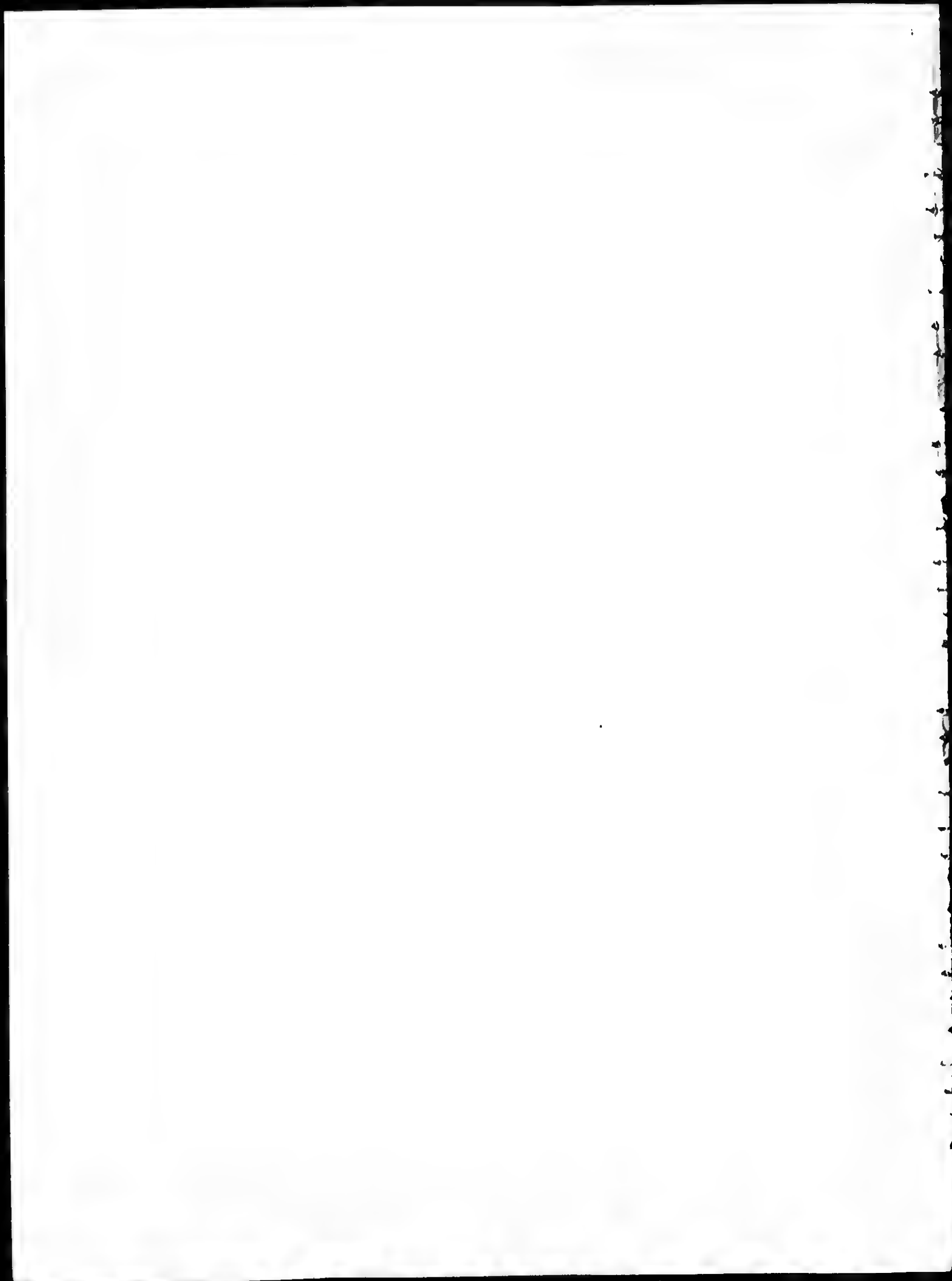
the trial or that will be said during this charge which should carry with it any suggestion as to how the Court feels this case should be decided because you are the sole judges of the issues of fact in the case and for me to suggest how you should decide the case would constitute a wholly unwarranted assumption of your prerogatives in the case.

Now, as I have said, you are the sole judges of the issues of fact which you must decide in this case. You must base your judgment upon the evidence which you have heard from the witness stand, the exhibits which have been received in evidence, the stipulations made by counsel during the course of the trial, and the inferences which are reasonably deducible from that evidence. That is, the testimony, the exhibits and the stipulations.

Now, if in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others. Your determination of the guilt or innocence of the defendants must be reached solely on the basis of relevant evidence adduced at this trial, without any feeling or emotion, bias or prejudice, without any anger on the one hand, and without any sympathy on the other.

Now, the defendants have been indicted in this case charged with conspiracy to violate certain statutes relating to influencing a witness, perjury and subornation of perjury and with the substantive offense of attempting to influence witnesses.

A little later on I will read the indictment to you but I wish to say and emphasize at this point that the fact of their indictment



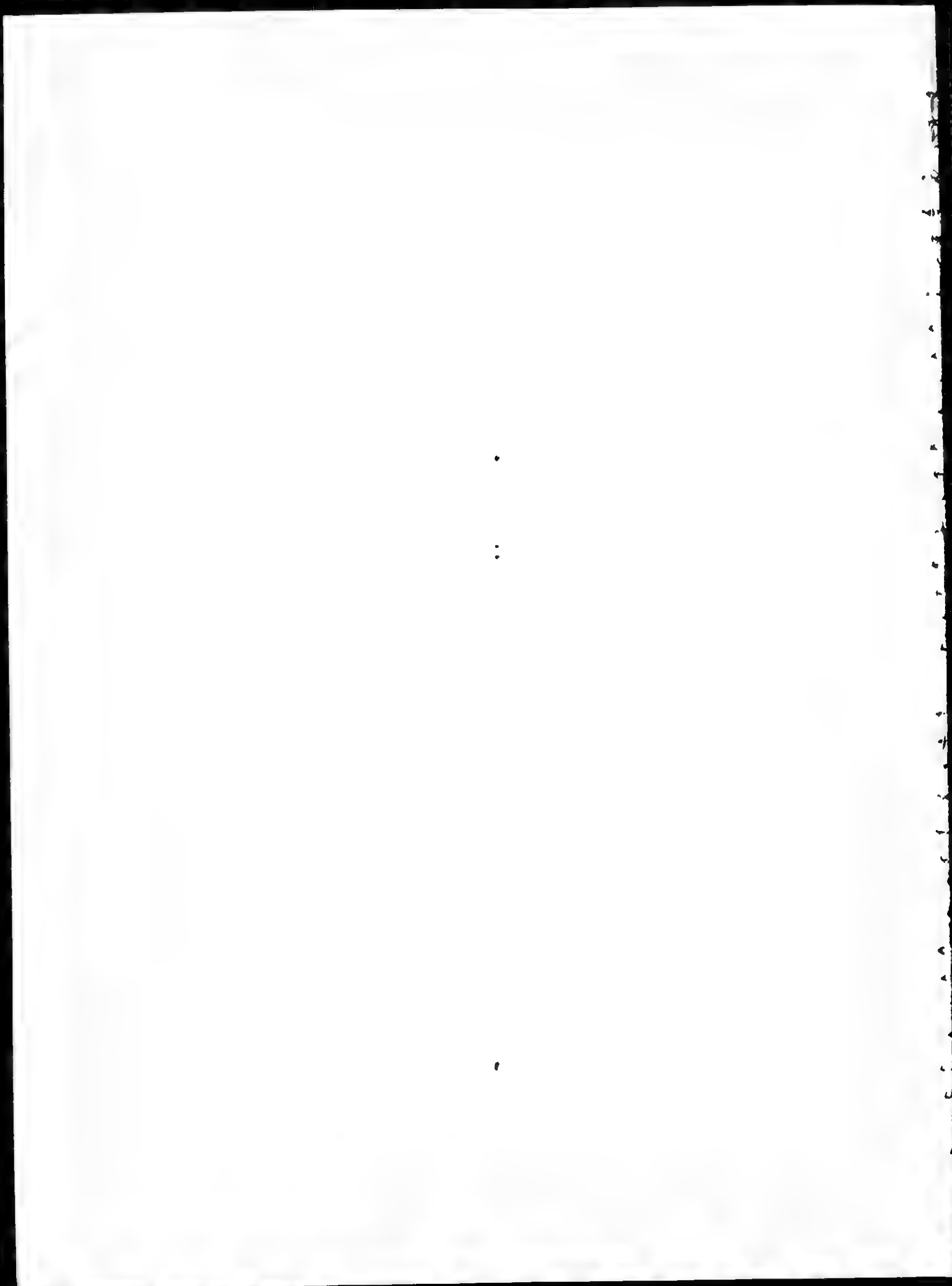
raises no inference of guilt. The indictment is the method whereby the defendants are brought to trial and by which they are informed of the charges made against them. It is not evidence in the case.

Every defendant in a criminal case is presumed to be innocent and this presumption of innocence attaches to a defendant throughout the trial. The burden is on the Government to prove the defendants guilty beyond a reasonable doubt, and if the Government fails to sustain this burden, then, as to such defendant or defendants, you must find them not guilty.

You may well ask what is meant by the phrase, "a reasonable doubt." It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not necessarily proof to a mathematical certainty. A reasonable doubt is one which is reasonable in view of all the evidence.

Therefore, if after impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied with the guilt of one or both of the defendants, then, as to such defendant or defendants, you would have a reasonable doubt. But, if after such impartial comparison and consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendants you can truthfully say that you have an abiding conviction of the defendants' or either of their guilt, such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then as to such defendant or defendants you have no reasonable doubt.

In determining whether the Government has established the charges against the defendants beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses who have testified



before you and all the circumstances concerning which testimony has been introduced.

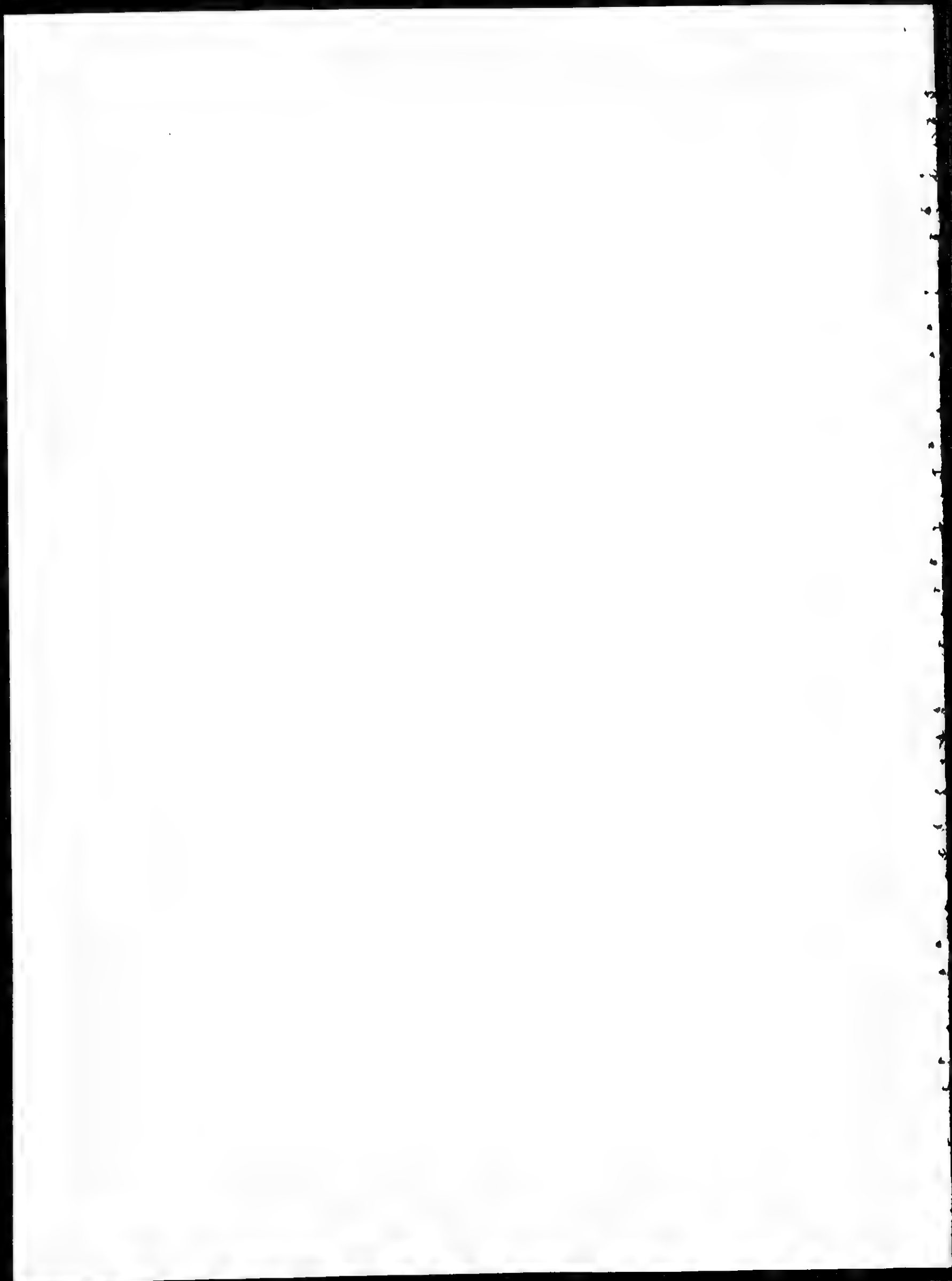
You are the sole judges of the credibility of witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which any witness should be credited. In case there is a conflict in the testimony, it is your function to resolve the conflict and to determine where the truth lies.

In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider any matter that may have a bearing on the subject. For instance, you may consider the demeanor and the behavior of the witness on the witness stand, the witness' manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, whether the witness has any motive for not telling the truth, whether the witness had full opportunity to observe the matters concerning which the witness has testified and whether the witness has any interest in the outcome of the case.

If you find that any witness wilfully testified falsely on the stand in this case as to any material fact concerning which the witness could not reasonably have been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness or any part of the testimony of such witness.

Now, it is the settled law in this country that accomplices in the commission of a crime are competent witnesses, and the Government has the right to use them as witnesses. In this regard I refer to the testimony of Bernice Gross.

It is the duty of the Court to admit their testimony and it is your duty to consider it. It should be received with caution and



scrutinized with care. The degree of credibility which you should give to such testimony is a matter exclusively within your jurisdiction.

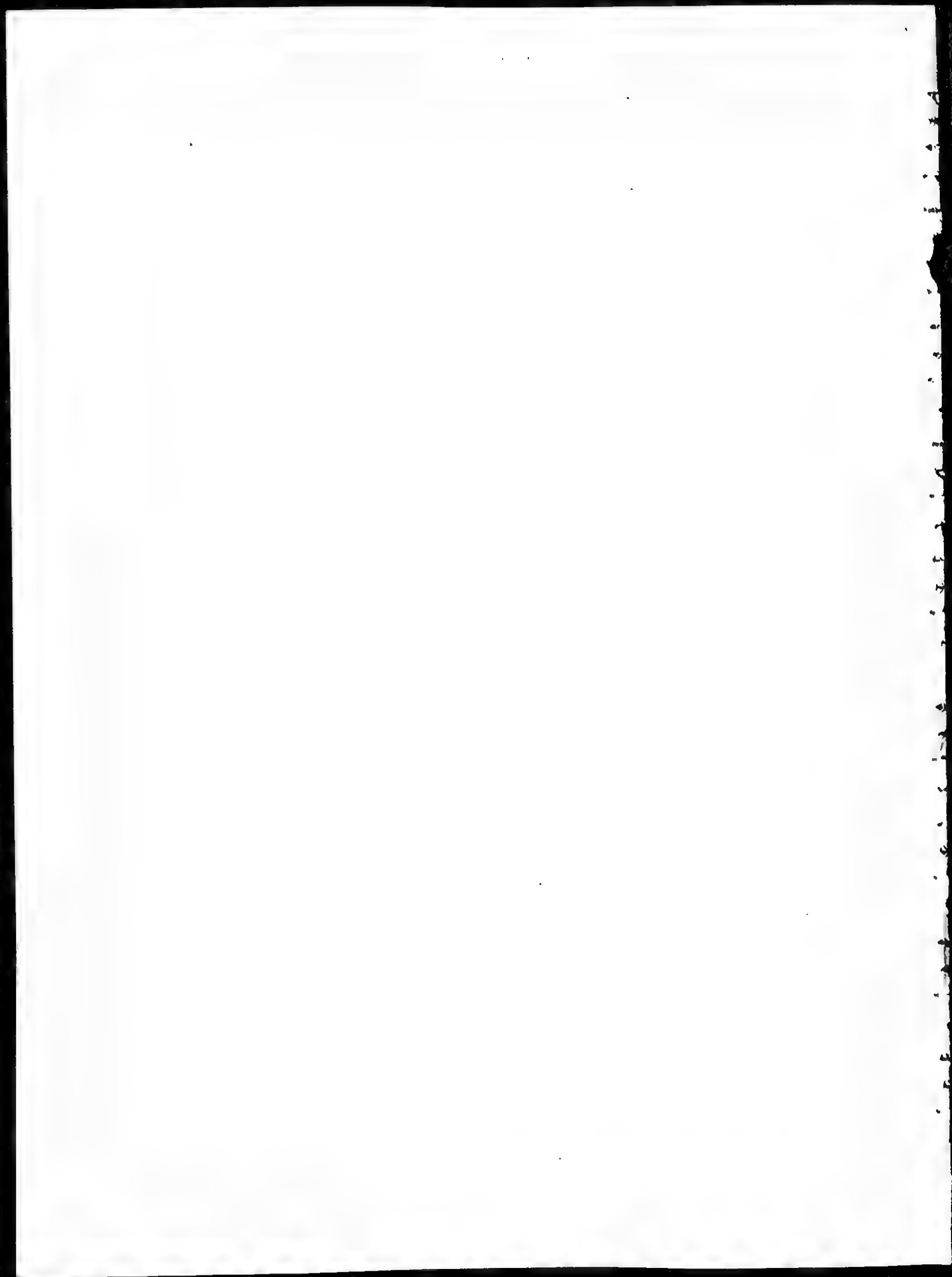
You may, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice. If you find that an accomplice is substantially corroborated by independent evidence with respect to material parts of his or her testimony, you should give the entire testimony such weight as in your opinion it deserves.

Now, the witness Bernice Gross has admitted that she gave perjured testimony before the Grand Jury in her first appearance before that body on March the 1st, 1963. You are instructed that the testimony of an admitted perjurer should be considered with caution and weighed with care.

In connection with the testimony of Bernice Gross, you may also consider in judging her credibility whether she is in fear of prosecution and whether she expects leniency by the Grand Jury and the U. S. Attorney's Office and if so, whether or not that affects her credibility in any way.

Now, the first count of the indictment charges conspiracy to violate certain statutes of the United States relative to influencing a witness, perjury and subornation of perjury; and I shall read to you the main part of that indictment. I shall not read to you the overt acts alleged since counsel said they do not require that. A copy, of course, of the indictment will go with you to the jury room and there you may read the overt acts yourself; but the substantial part of the charge under Count 1 is as follows:

That a grand jury was sworn in on July 5, 1961 in the United States District Court for the District of Columbia and is known and hereafter referred to as the July 1961 Grand Jury;



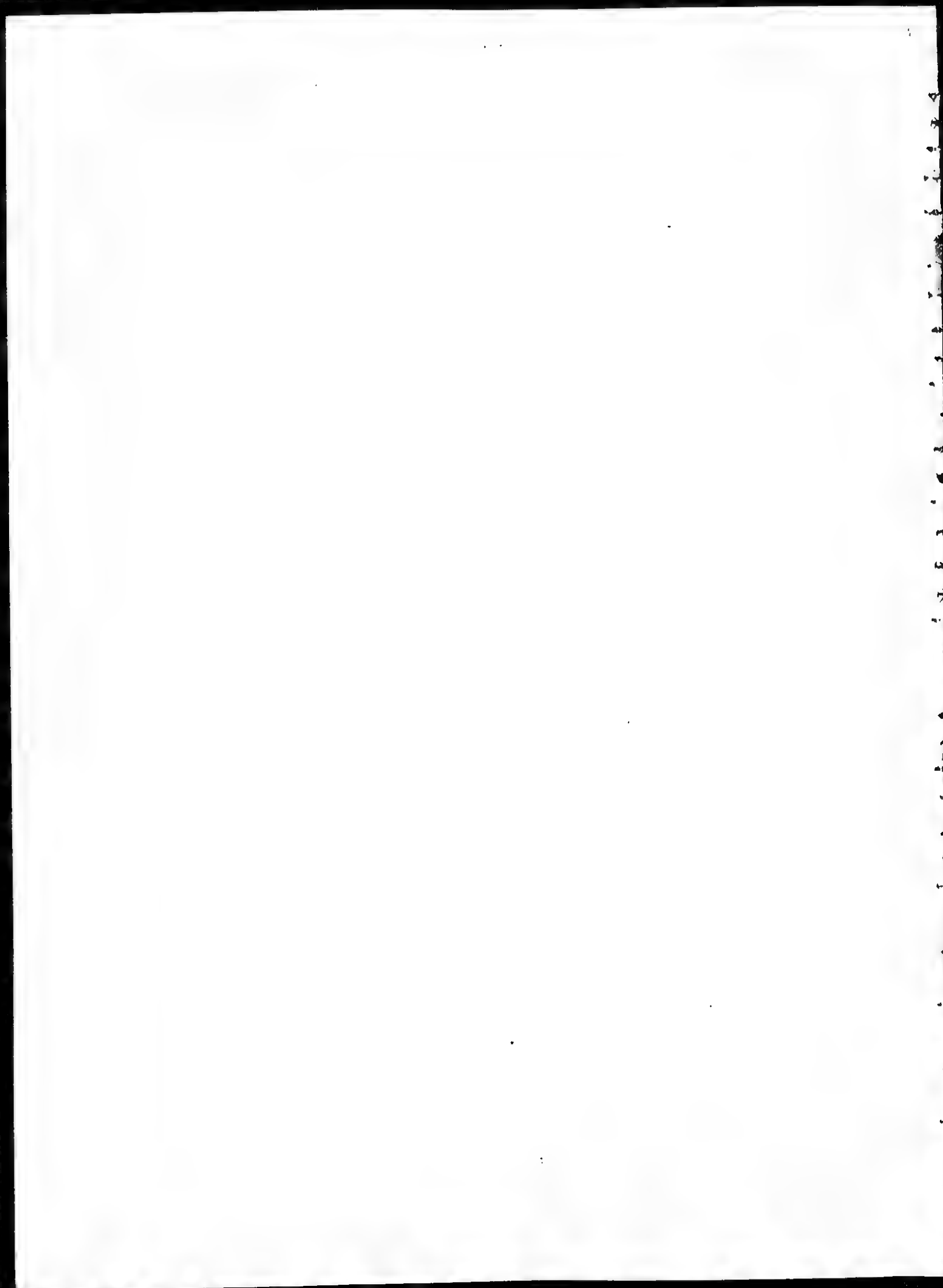
That on September the 11th, 1961, Allen U. Forte was indicted by the July 1961 Grand Jury in Criminal Case Number 741-61, United States versus Allen U. Forte, and charged in four counts, each of which charged a violation of the abortion statute of the District of Columbia, Title 22, District of Columbia Code, Section 201;

Two, that a petit jury was sworn in on February 12, 1963 in the United States District Court for the District of Columbia for the trial of Counts 1 and 2 of the United States versus Allen U. Forte, Criminal Number 741-61, at which trial the defendant Allen U. Forte was represented by counsel James J. Laughlin;

Three, that the said Allen U. Forte and the said James J. Laughlin, the defendants indicted in this count, well knew the proceedings preliminary to and the trial of Counts 1 and 2 of the aforesaid indictment would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961;

More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things; (a) whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961; (b) whether, within the District of Columbia, an abortion was attempted, or procured, or produced on the said Jean Smith, and by what means; and, (c) whether the defendant Allen U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph (b) above;

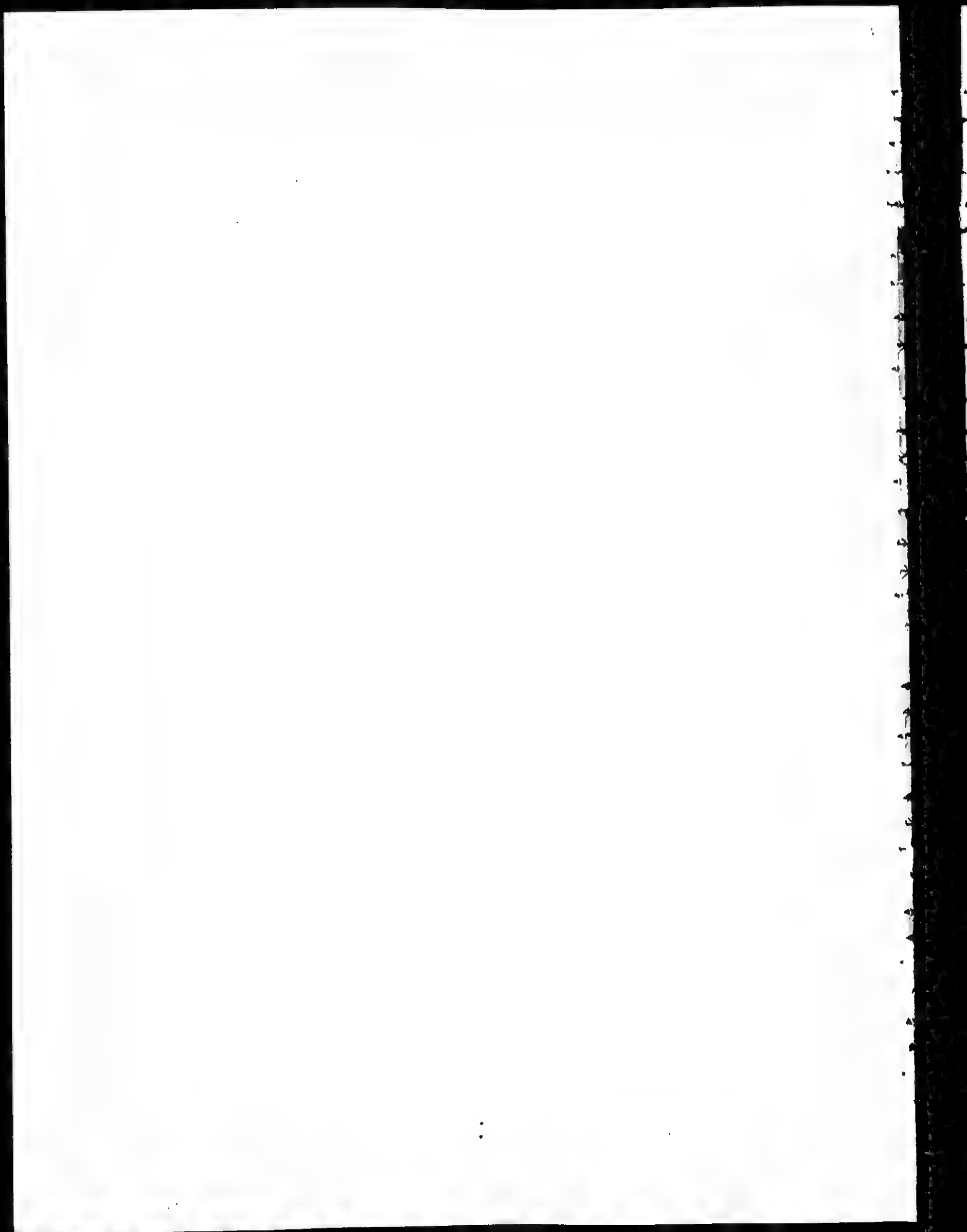
Four, that commencing on or about September 1, 1961 and continuously thereafter, until on or about February 20, 1963, the date of the return of the verdict in the trial of Counts 1 and 2 of United States versus Allen U. Forte, Criminal 741-61, within the District of



Columbia and the states of Maryland and Virginia, and at other places unknown to this January 1963 Grand Jury, the said defendants, Allen U. Forte and James J. Laughlin did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together, and with each other, and with one Bernice Gross, a co-conspirator, but not made a defendant herein, and with other co-conspirators unknown to this January 1963 Grand Jury, to defraud the United States and to commit other offenses against the United States, to wit: Violations of Title 18, United States Code, Section 1503, "Influencing Witness," Section 1621, "Perjury," and Section 1622, "Subornation of Perjury;"

Five, that it was a part of the said conspiracy that said defendants and co-conspirators, well knowing, believing and expecting, and having reason to know well, believe and expect, that the said Jean Smith would be a material witness in the proceedings preliminary to and in the trial of Counts 1 and 2 of United States versus Allen U. Forte, Criminal Case Number 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs (a), (b) and (c) thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting and persuading her to induce the Government to abandon prosecution, and if prosecution was not abandoned, then to absent herself from the said proceedings and trial, and if she did not absent herself, then to testify falsely to the aforesaid matters at said proceeding and trial.

Seven, that it was also a part of the said conspiracy that the said defendants and co-conspirators would and did corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Columbia



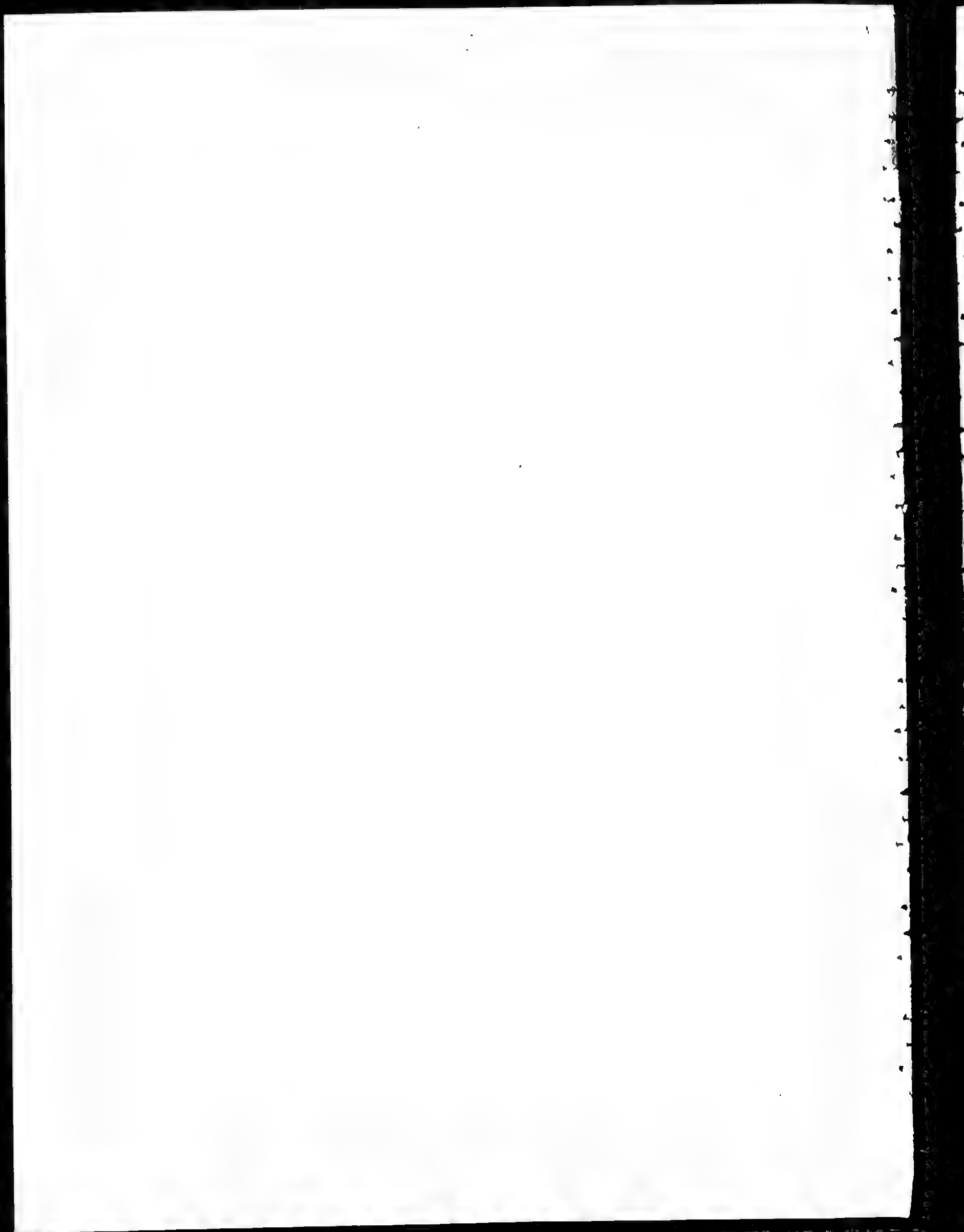
in the proceedings preliminary to and in the trial of Counts 1 and 2 of United States versus Allen U. Forte, Criminal Case Number 741-61, in the manner and by the means above described.

Now, the conspiracy statute, 18 U. S. Code, 371, reads as follows, in so far as it is pertinent:

If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons does an act to affect the object of the conspiracy, each shall be punished by the penalty prescribed by the Statute.

Now a conspiracy is a combination by two or more persons to accomplish a criminal purpose by concerted action. In other words, a conspiracy is a partnership in crime. A conspiracy is created by an agreement to commit a crime. It is not necessary, however, to show that the persons charged with conspiracy met together and entered into a formal agreement. It is sufficient to show that they tacitly came to a mutual understanding to accomplish the unlawful design. Such an understanding need not be shown directly. Ordinarily a conspiracy is characterized by secrecy. The agreement may be inferred from circumstances such as the conduct of the parties and the acts done by the accused persons. Such an agreement may be inferred from the fact that two or more persons are acting together in an endeavor to accomplish the unlawful result.

Conspiracy to commit a crime is an offense separate and distinct from the crime itself. In order to justify a conviction on the charge of conspiracy, the following elements must be established beyond a reasonable doubt:



First, that the conspiracy alleged was formed and existed at or about the time alleged;

Second, that the accused knowingly and wilfully became a member of the conspiracy;

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged, and;

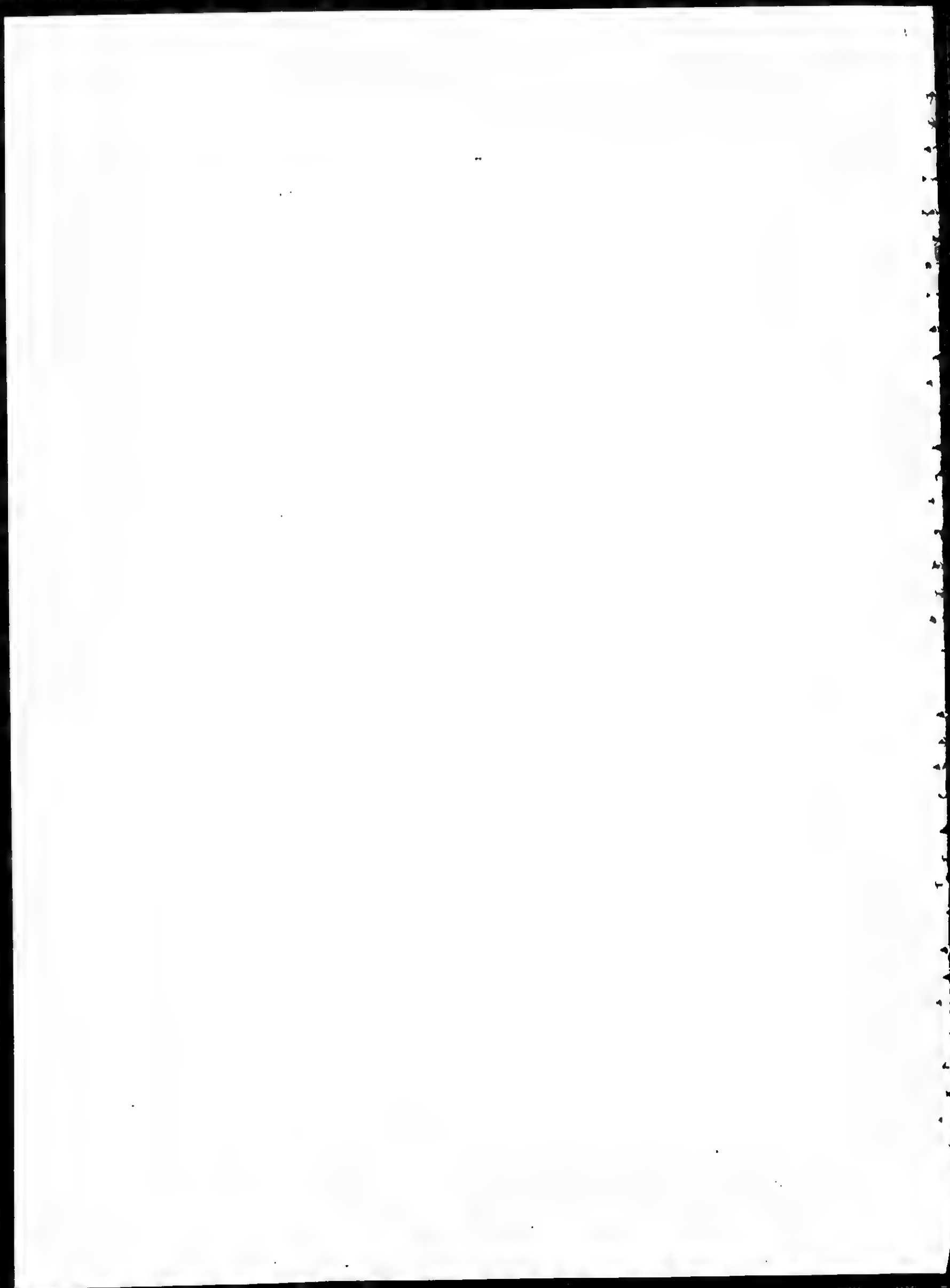
Fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

The overt act need not be a criminal act. It may be an innocent act standing by itself, but if it has a tendency to accomplish the purpose of the conspiracy, it is sufficient as an overt act. It is sufficient to prove a single overt act even though several overt acts may be alleged in the indictment.

Now, it is not necessary, in order to convict the defendant on a charge of conspiracy, that he shall have been a member of the conspiracy from the beginning. Different persons may become members of the conspiracy at different times. They may perform different parts in it. They need not be aware of all the ramifications of the conspiracy.

If any defendant knew of the conspiracy and purposely took some part, large or small, in carrying it into effect, he becomes part and parcel of it and may be found guilty of conspiracy. The fact that he may not have been in the conspiracy at its inception or that he may have taken a minor part, or that he may not have known all of the conspirators, is immaterial as is also the fact that he may have become a party to it at a later stage of its progress.

It has been said that conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is

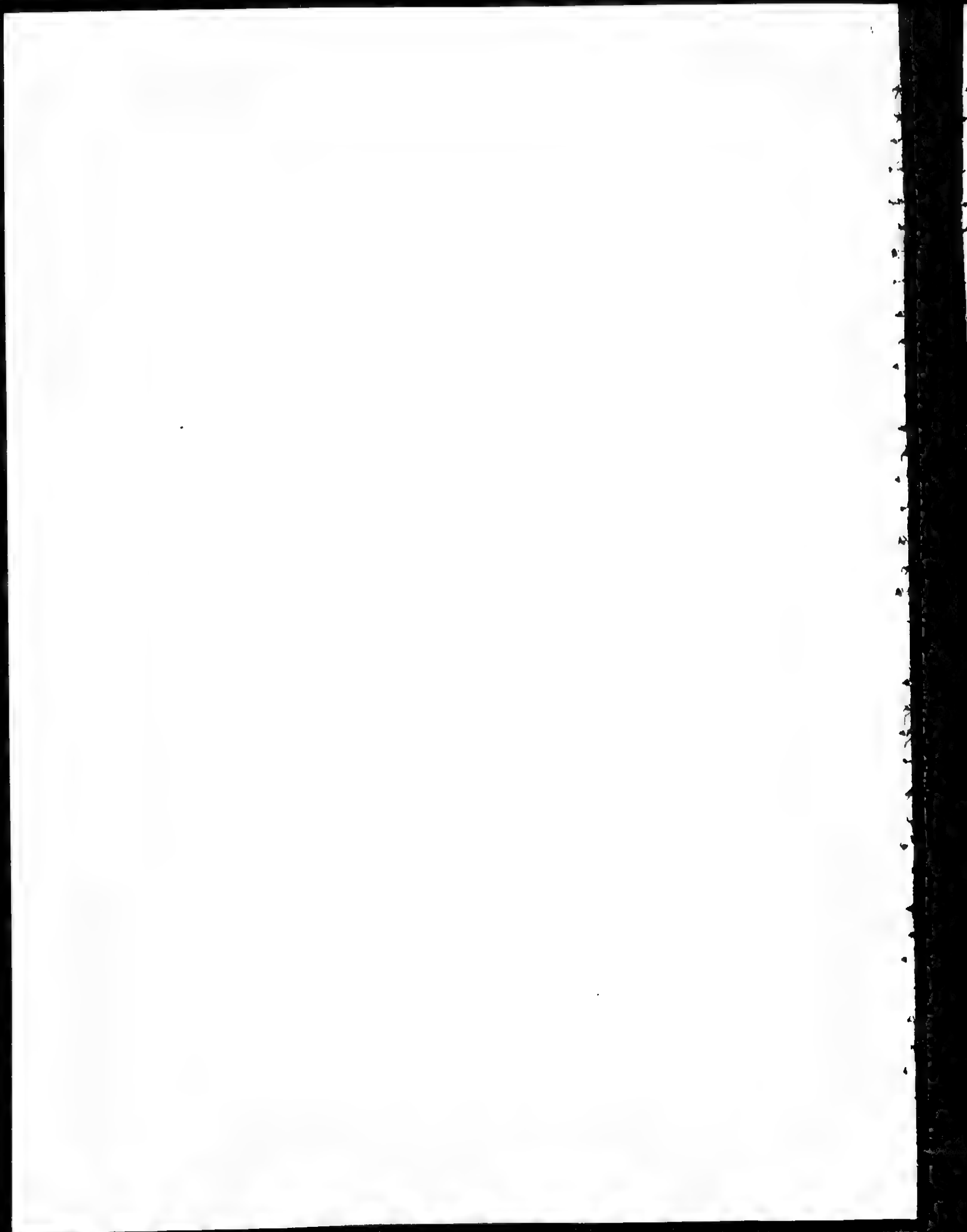


the essence of the crime and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result.

If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy; but, if knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

Now, one may become a member of a conspiracy without full knowledge of all the details as I have said. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers an object or purpose of the conspiracy does not thereby become a conspirator; and you are instructed that an attorney on behalf of a defendant has the right, and it is his plain duty toward his client, to fully investigate the case in which he represents his client and to interview and examine as many as possible of the witnesses involved who could assist him in ascertaining the truth concerning the events in controversy. Witnesses are not parties and should not be partisan. They may be summoned by one side or the other, or by both.

The defendant James J. Laughlin, as attorney for the defendant Allen U. Forte in Criminal 741-61 was under a duty and obligation to properly investigate the facts and to interview any and all



persons who might have knowledge or could shed any light on the allegations in the indictment.

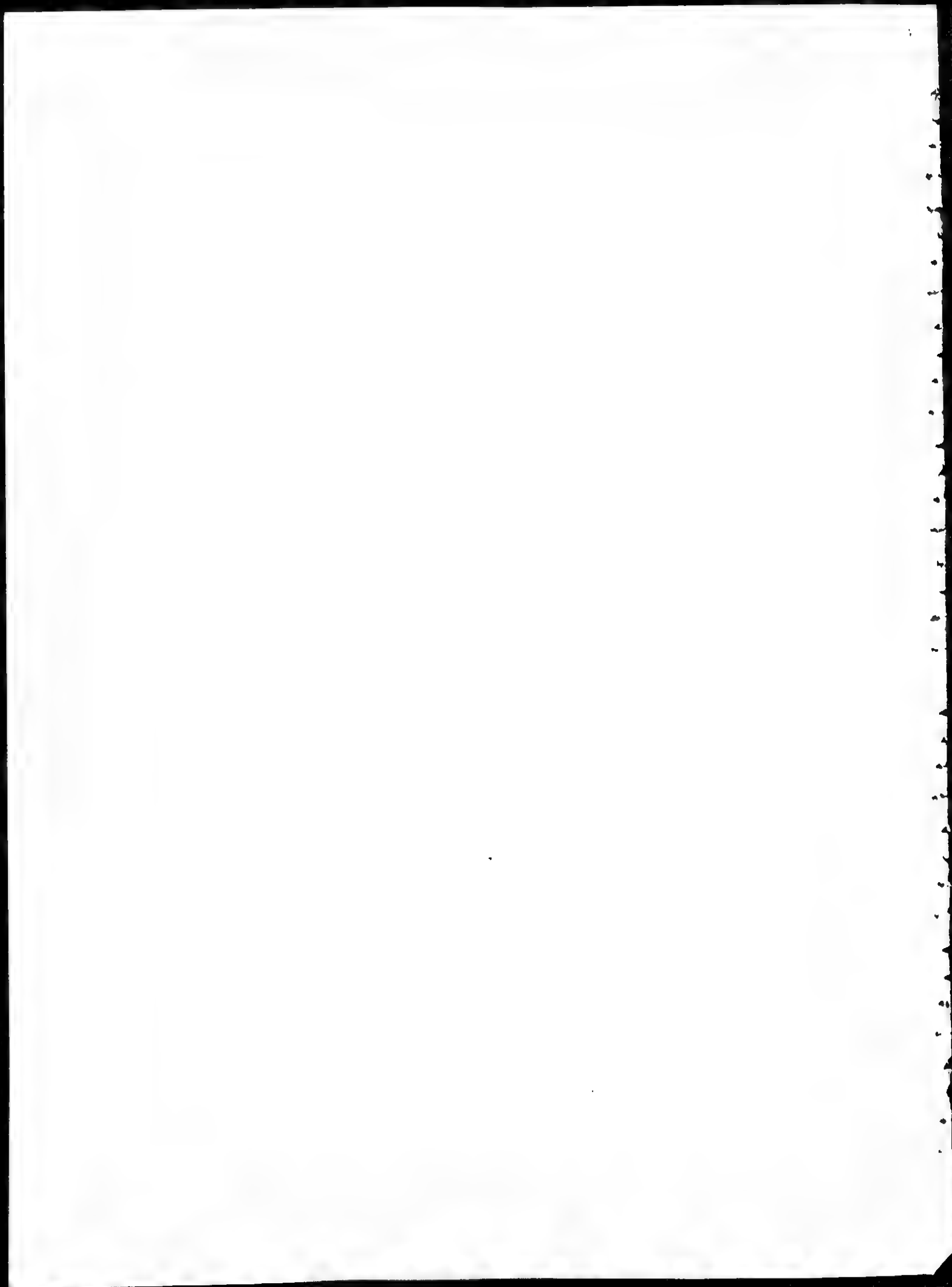
However, a lawyer representing a client in a pending case before the Court does not have a right to conspire with anyone to influence a witness not to give testimony in a pending case or to influence a witness to testify falsely in a case.

With regard to the conspiracy count, a mere meeting between the defendants for innocent or legitimate purpose could not be construed as the beginning of a conspiratorial relationship, nor does the mere innocent association or acquaintanceship of one defendant with another establish the essence of a conspiracy.

Before a jury may find that a defendant or any other person has become a member of a conspiracy, the evidence must show that the conspiracy was formed and that the defendant, or other person who is claimed to have been a member, knowingly and wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids or with specific intent to fail to do some act which the law requires to be done. That is to say to participate with bad purpose either to disobey or to disregard the law. So, if a defendant or any other person with understanding of the unlawful character of a plan intentionally encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilfull participant, a conspirator.

One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the

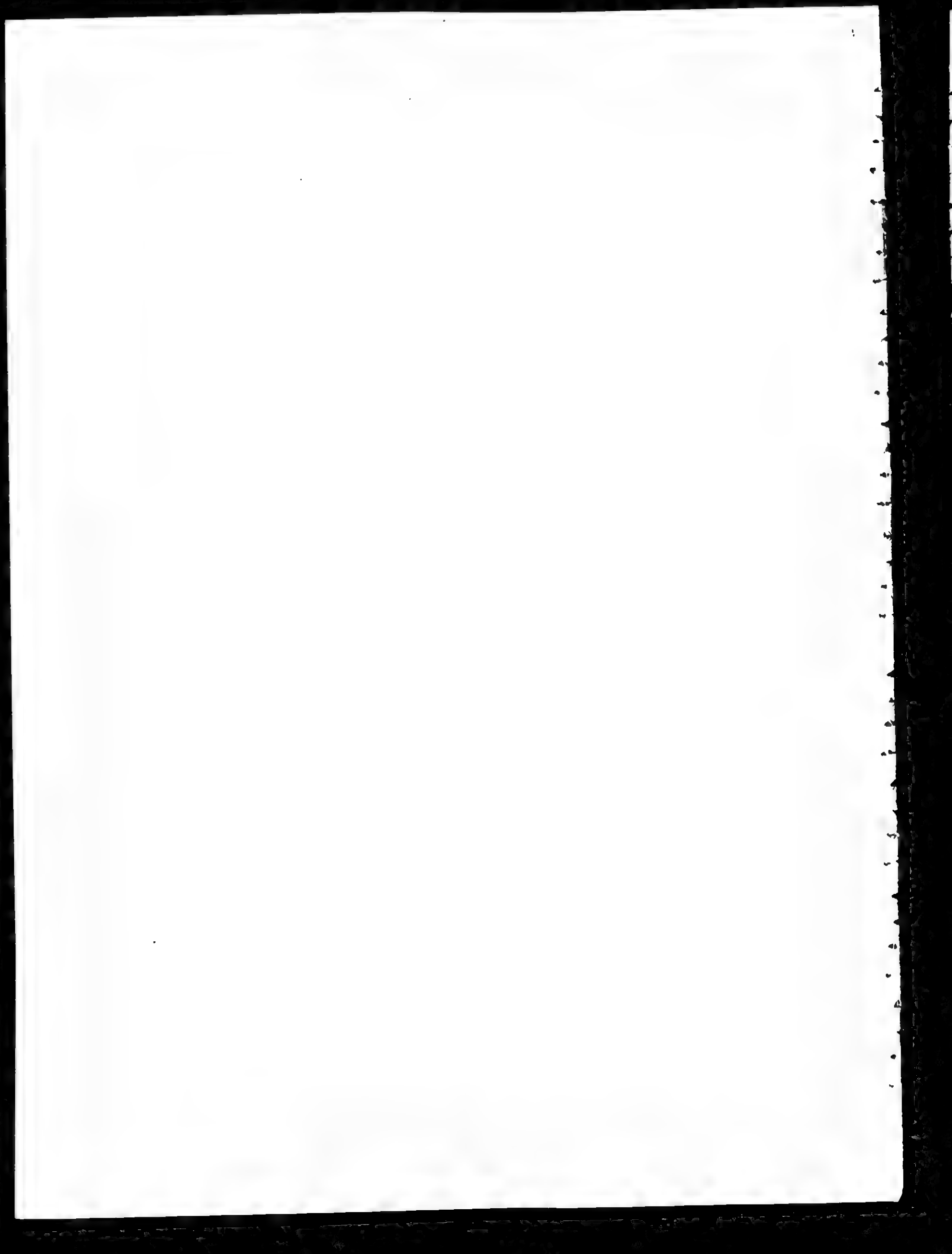


instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant or any other person in a conspiracy must be established by evidence as to his own conduct, what he himself said or did but if and when it appears from the evidence that a conspiracy existed and that a defendant was one of the members, then the acts thereafter, knowingly done, and the statements thereafter knowingly made by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendants found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the particular defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy. Otherwise, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and did not hear the statements made.

In your consideration of the evidence as to the offense of conspiracy charged in the first count, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you find that the Government has proved beyond a reasonable doubt that such conspiracy did exist, you should next determine whether the defendant Forte and the defendant Laughlin, or either of them, knowingly and wilfully became a member of the conspiracy.

If it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and wilfully formed as alleged in

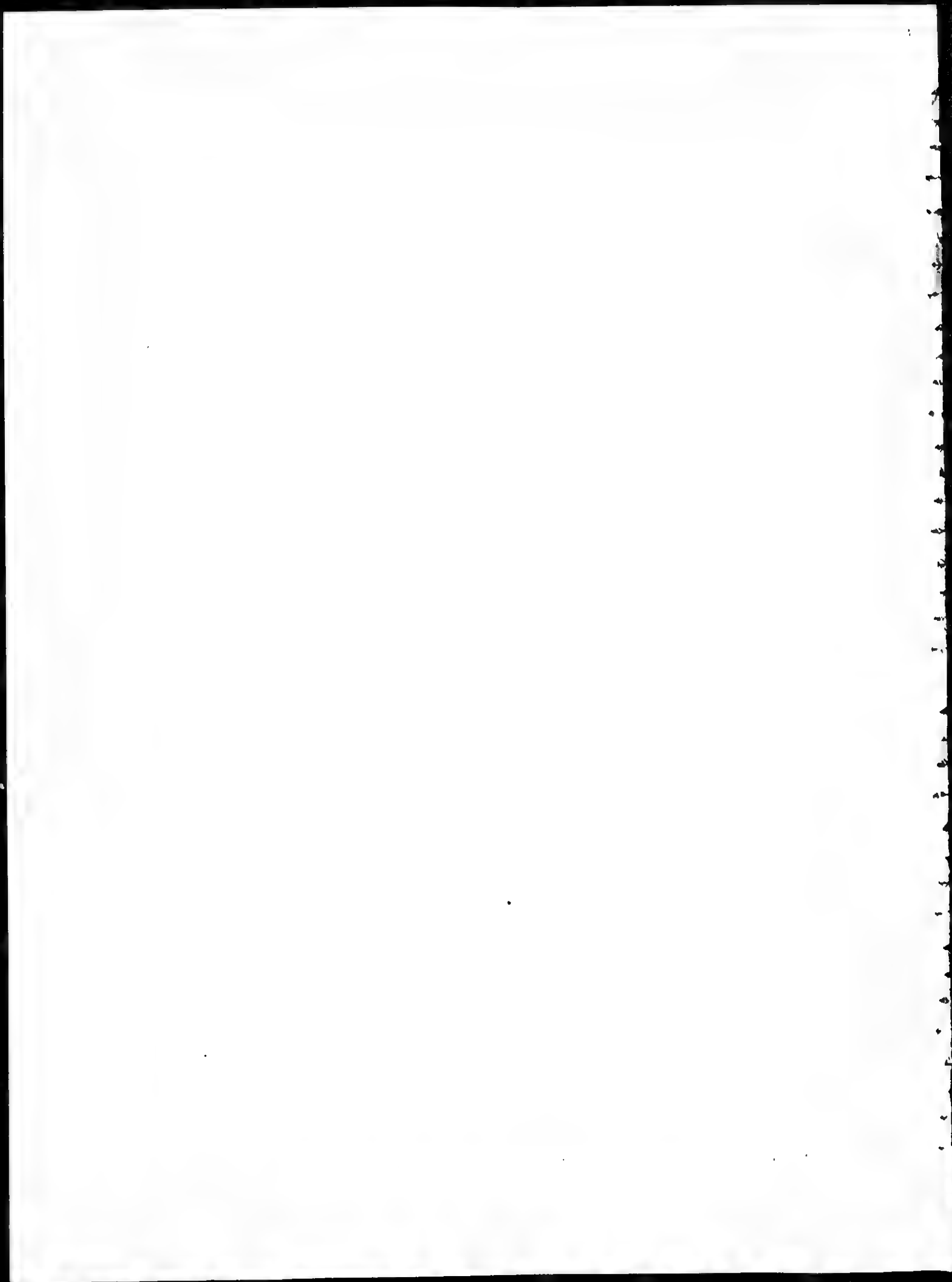


the indictment and that the accused, or either of them, wilfully became a member of the conspiracy at the inception of the plan or scheme or at some period after the inception of the plan or scheme and that thereafter one or more of the conspirators knowingly committed, in furtherance of the object or purpose of conspiracy, one or more of the overt acts charged, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

By the term "overt act" is meant any act committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent as the act of using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

If in this case you find that the conspiracy has been proved beyond a reasonable doubt and that one or both of the defendants knowingly and wilfully became a member or members of the conspiracy at the inception of the plan or afterwards, and that one or more of the conspirators knowingly committed, in furtherance of an object or purpose of the conspiracy one or more of the overt acts charged, then either or both of the defendants who knowingly and wilfully became a member of the conspiracy at the inception of the plan or scheme, or afterward, would be guilty under the first count; and this would be true even though the conspiracy was unsuccessful in its purpose.

The essence of the conspiracy in this case is the charge that there existed a conspiracy in connection with the case of the United States versus Allen U. Forte, Criminal Number 741-61, in this



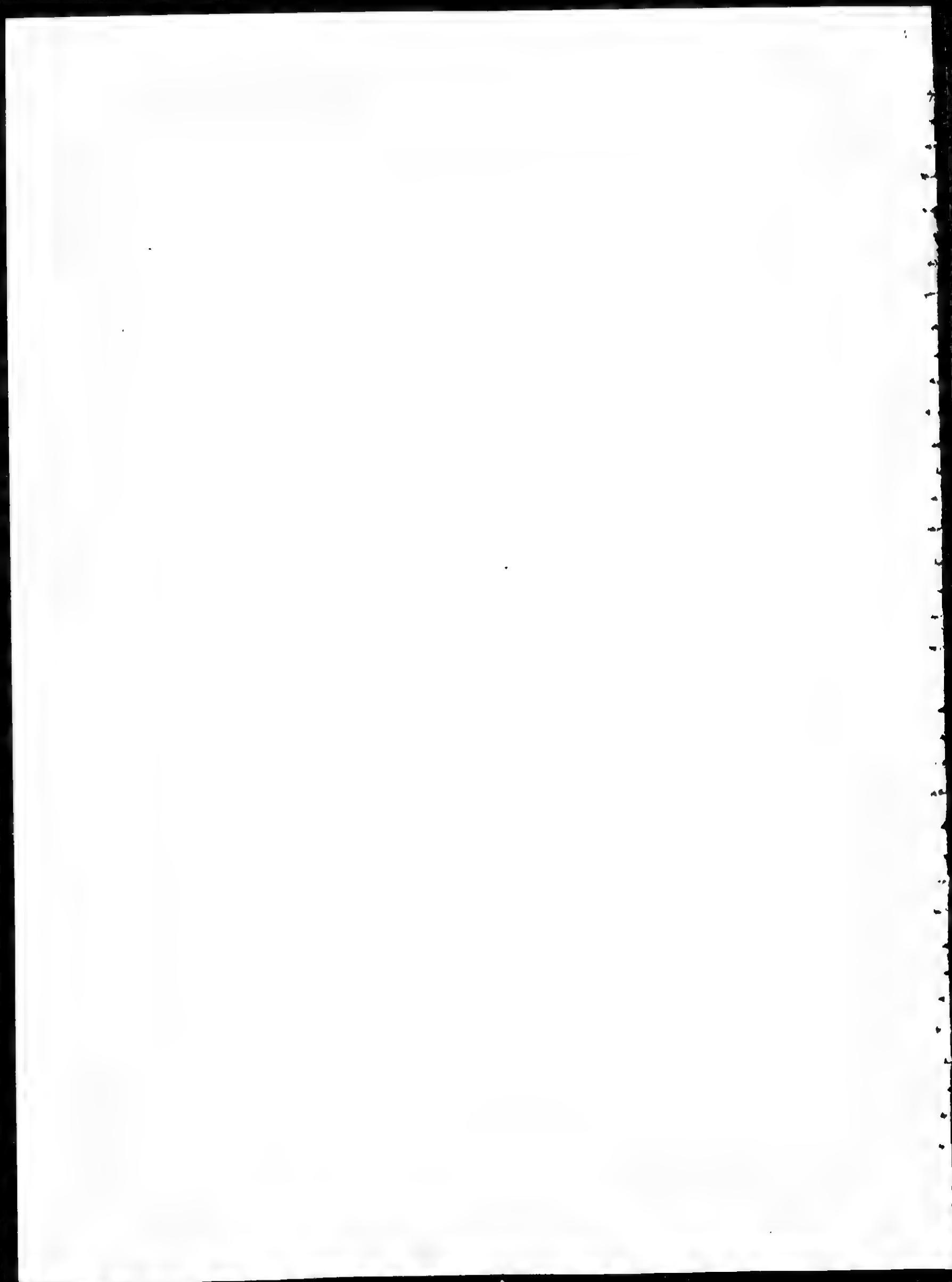
court, to prevail upon one Jean Smith, a witness in that case, not to testify in the case, or, if she did testify, to testify falsely.

If in fact Jean Smith did testify in Criminal Number 741-61, and did testify truthfully in that case, or, in other words, if the object of the conspiracy failed entirely, the defendant, or defendants, who knowingly and wilfully became a member of the conspiracy at the inception of the plan or scheme, or afterward, would still be guilty under Count 1 provided one or more of the overt acts charged is proved as I have previously instructed you.

Likewise, I instruct you that the question of whether or not Allen U. Forte was in fact guilty or not of the charges made against him in the first two counts of Criminal Number 741-61 has no bearing on whether or not either of the defendants are guilty of the acts charged in this indictment.

Thus, if the conspiracy in fact existed and if in fact one or more of the overt acts charged under the conspiracy is proved beyond a reasonable doubt, then either or both of the defendants who knowingly and wilfully became a member of the conspiracy at the inception of the plan or scheme, or afterwards, would be guilty of the conspiracy even though Allen U. Forte was in fact innocent of the charges made against him in the first two counts of the indictment in Criminal Number 741-61, which charged a violation of the abortion statute in the District of Columbia in connection with an alleged abortion performed on one Jean Smith.

If the jury should find that the conspiracy charge has not been proved beyond a reasonable doubt or if the jury should find that none of the overt acts charged has been proved beyond a reasonable doubt, then both of the defendants would be not guilty under Count 1



of the indictment.

If the jury should find that both the conspiracy and an overt act has been proved beyond a reasonable doubt but that one of the defendants charged herein did not wilfully become a member of the conspiracy at the inception of the plan or scheme, or at a time after its inception and before its completion, then as to such defendant the jury would bring in a verdict of not guilty.

You are instructed that if the conspiracy charged in this case existed, that said conspiracy necessarily terminated on February 20, 1963, when Criminal Case Number 741-61 terminated.

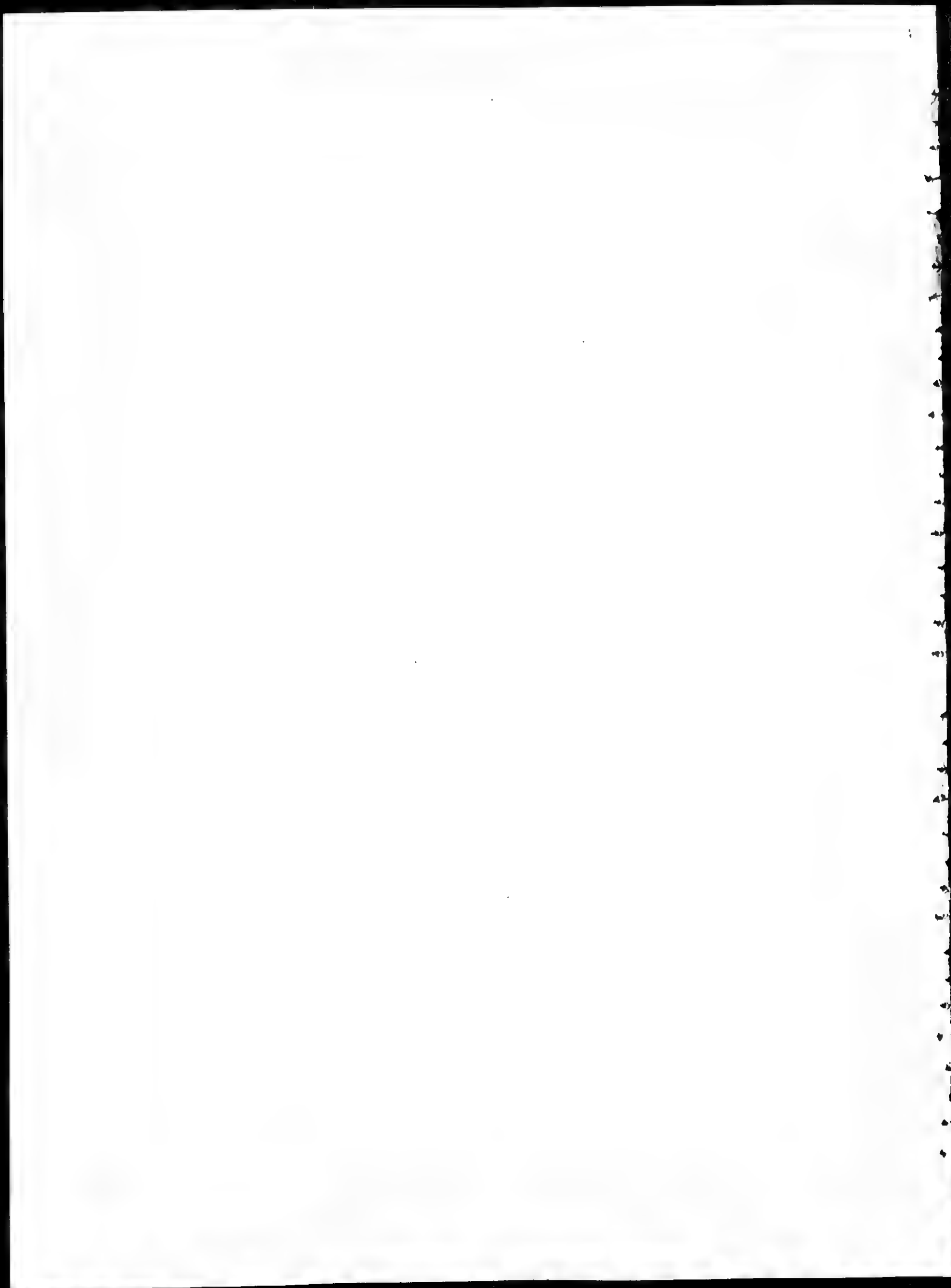
This Court admitted in evidence certain tape recordings of alleged telephone calls between Bernice Gross and defendant Laughlin on March 1, March 13 and March 18, 1963, the same covering a period of time after the alleged conspiracy ended.

I caution you again that this evidence, being Government's Exhibits 11, 12 and 13, is not admissible and may not be considered by you in any way against the defendant Forte. This evidence may be considered against the defendant Laughlin only, and then only for the purpose of connecting Laughlin with the conspiracy if you should find that one had been entered into.

Further, I instruct you that this particular evidence is not to be considered on the question of whether or not the conspiracy existed but only as bearing on the question of whether the defendant Laughlin was a part of any conspiracy that may have previously existed as alleged in the indictment if you find from other evidence adduced in the case that such conspiracy in fact existed.

Now, as to Counts 2 and 4:

Count 2 relates to the defendant Forte alone and it charges:



The first two numbered paragraphs of Count 1 in this indictment are by reference incorporated into and made a part of this count.

Two, that the said Allen U. Forte, the defendant indicted in this count, well knew the proceeding preliminary to, and the trial in, Counts 1 and 2 of United States versus Allen U. Forte, Criminal Case Number 741-61, would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961.

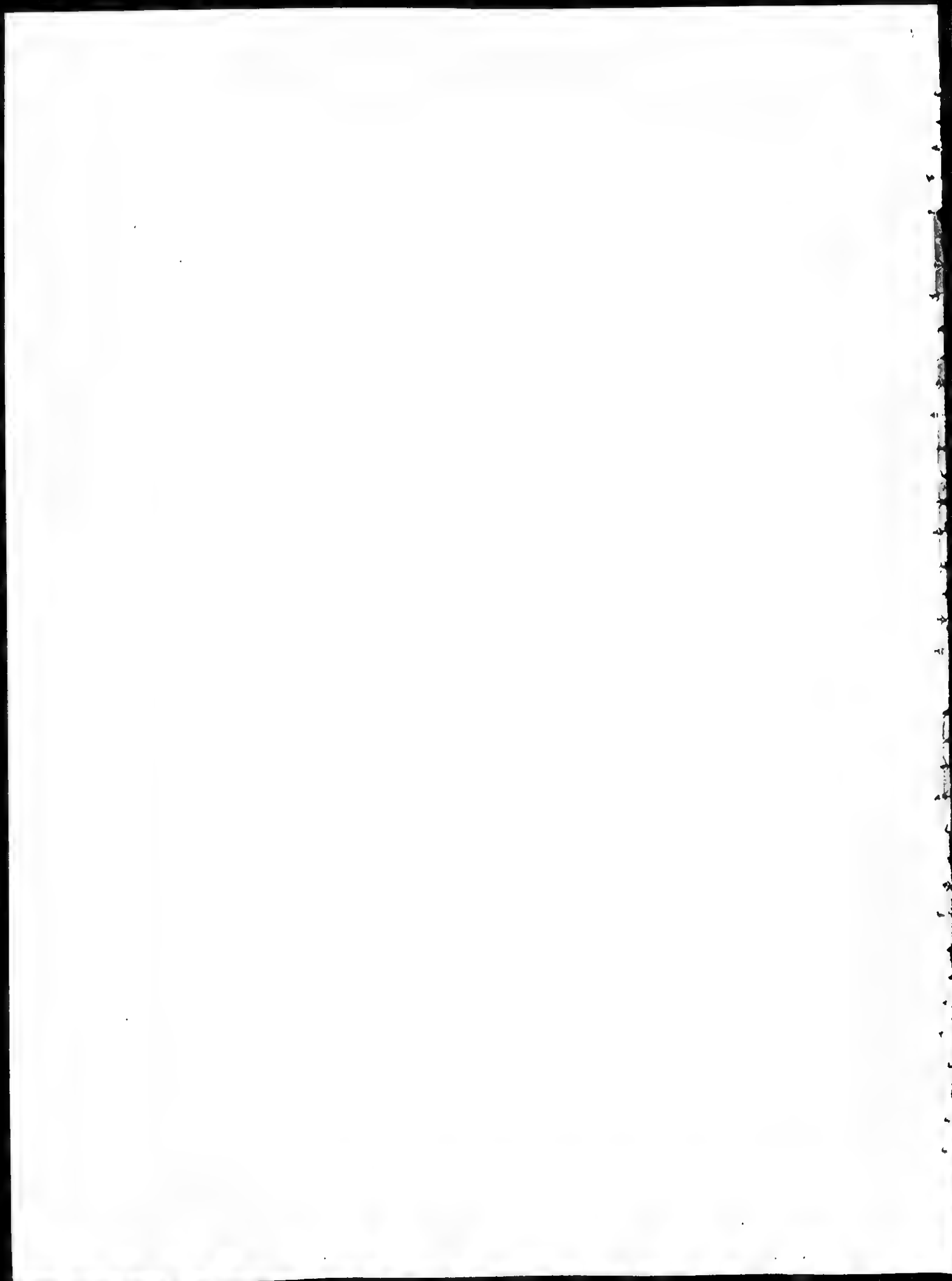
More specifically, it was material to the aforesaid proceeding and trial to ascertain, among other things;

(a) Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961,

(b) Whether within the District of Columbia, the abortion was attempted or procured or produced on the said Jean Smith and by what means, and,

(c) Whether the defendant Allen U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph (b) above, and;

Three, that on or about September 1, 1961 to February 20, 1963, the date of the return of the verdict in the trial of Counts 1 and 2 of United States versus Allen U. Forte, Criminal Case Number 741-61, within the District of Columbia, the defendant Allen U. Forte, well knowing, believing and expecting, and having reason to know well, believe and expect, that the said Jean Smith would be a material witness in the proceeding preliminary to and in the trial of Counts 1 and 2 of United States versus Allen U. Forte, Criminal Case Number 741-61, to testify with respect to the matters set forth above in paragraph 2, including subparagraphs a, b and c thereof, the defendant



Allen U. Forte did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then to absent herself from said proceedings and trial, and if she did not absent herself, then to testify falsely as to the aforesaid matters at said proceeding and trial.

Count Four charges the defendant Laughlin alone in substantially the same language except that it alleges that the acts occurred between April 15, 1962 to February 20, 1963, whereas against Forte, it is alleged from September 1, 1961 to February 20, 1963.

Mr. Garber, do you have any desire that I read Count 4?

MR. GARBER: No, Your Honor.

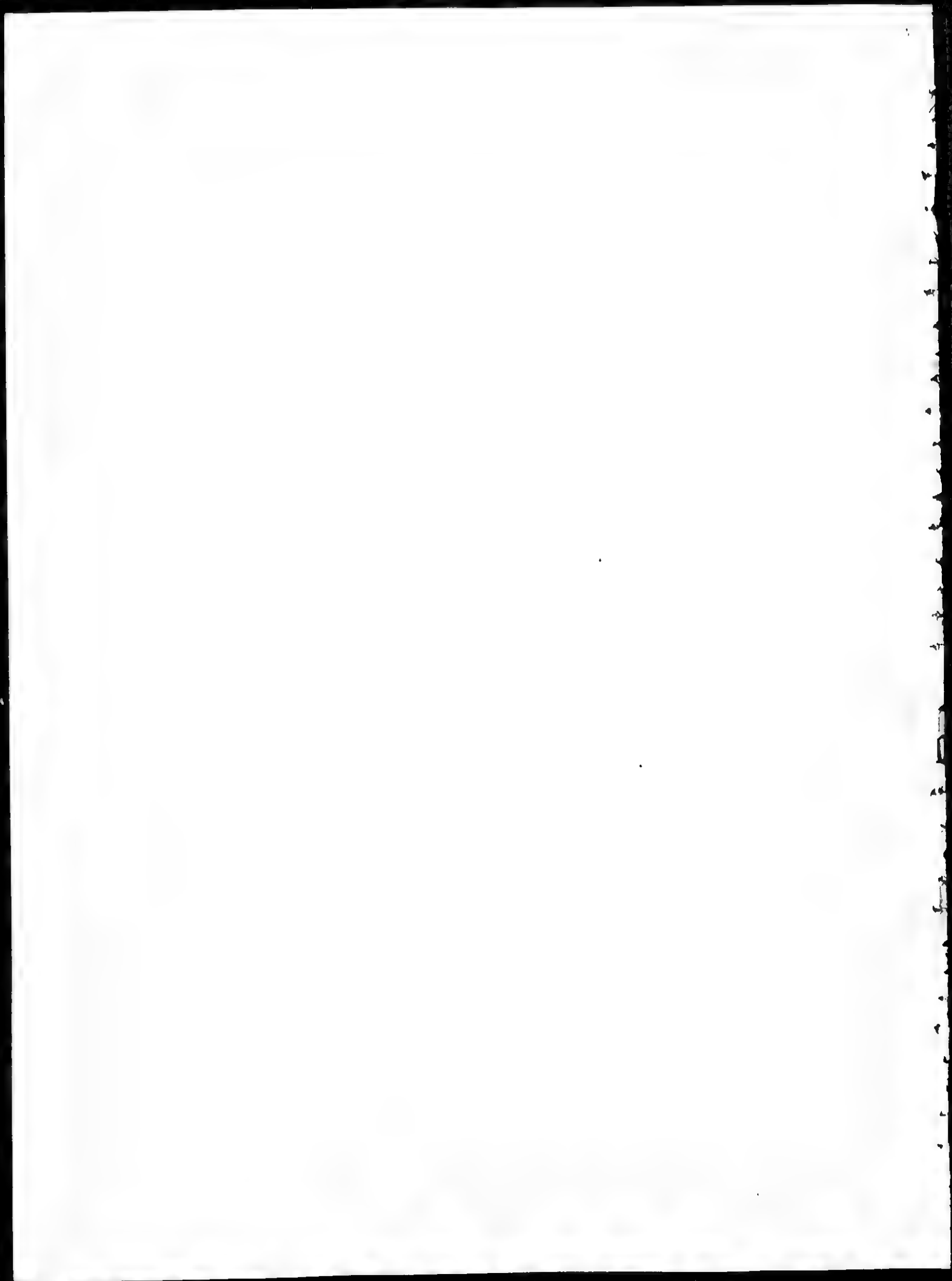
THE COURT: All right.

Of course you will have Count 4 before you in the jury room, ladies and gentlemen.

Now, these two counts in the indictment which I have just referred to; Count 2 charges the defendant Forte alone and Count 4 charges the defendant Laughlin alone. Each is charged with violating Section 1503 of Title 18 of the United States Code. This is one of the same sections which Count 1 charges that the defendants conspired to violate. But it is the violating of Section 1503 itself which is charged against the defendant Forte in Count 2 and against the defendant Laughlin in Count 4.

Now, Title 18, Section 1503, prohibits influencing a witness or obstructing the administration of justice in the following language:

Whoever corruptly endeavors to influence -- and I underline the word "endeavors" -- to influence, intimidate or impede any witness in any court of the United States in



the discharge of his duty, or corruptly influences, obstructs or impedes, or endeavors to influence or obstruct or impede the due administration of justice shall be punished by the penalty prescribed by the Statute.

Now, the following are the elements of the crimes charged in these two counts which must be proved as to each individual defendant in the count involved beyond a reasonable doubt:

1. That proceedings were pending in the United States District Court for the District of Columbia in Criminal Number 741-61 and the defendant, in each count as it may be, knew or believed that such proceedings were pending.

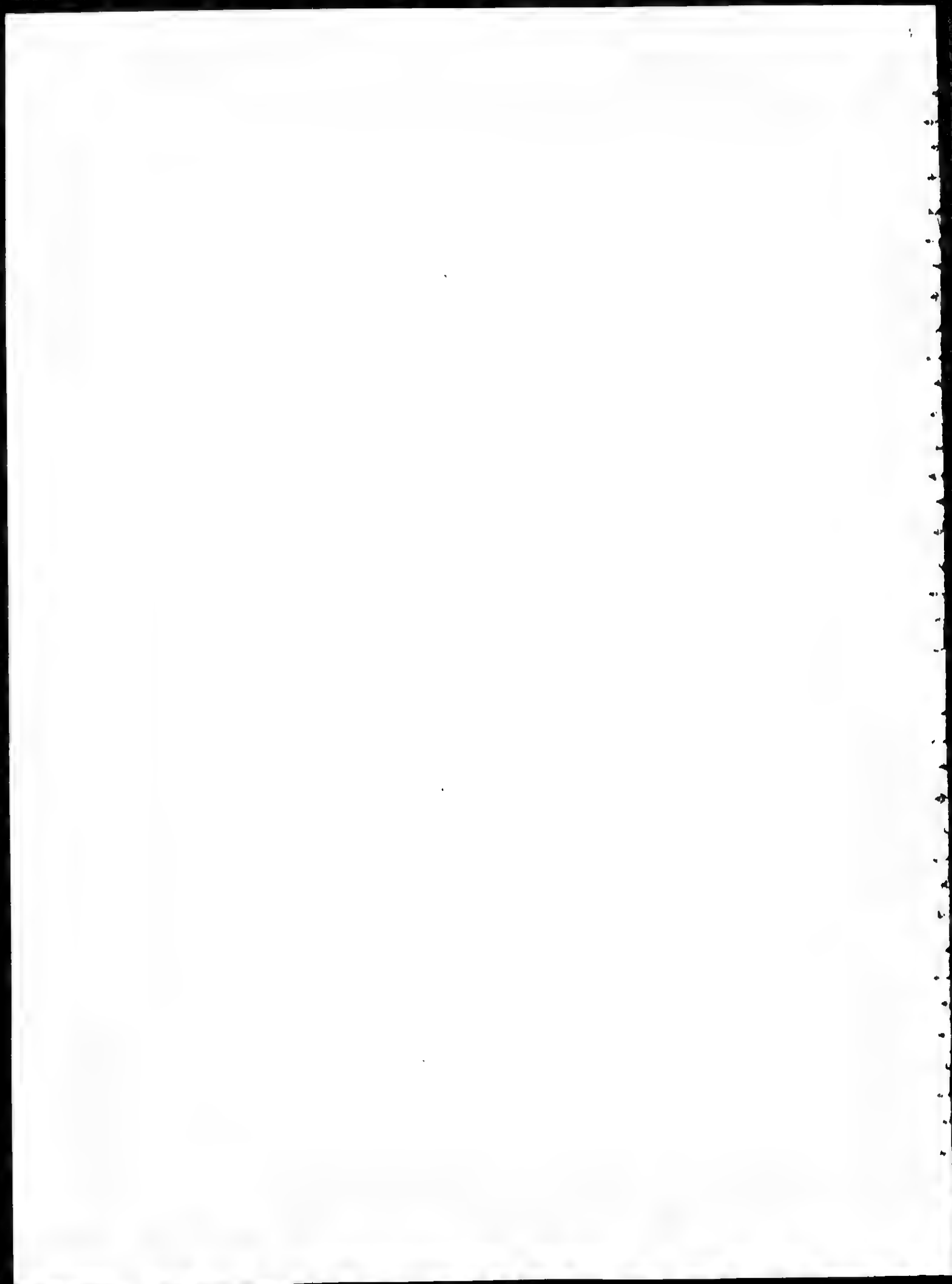
A criminal proceeding is pending between the time the indictment is filed in court and a verdict is reached. In 741-61, the indictment was returned to this Court on September the 11th, 1961, and the case was terminated on February 20, 1963.

2. That Jean Smith was expected to testify as a witness in that case and that the defendant -- and when I say "defendant" I am referring to each of them as the count, each count, involves them -- knew or believed that Jean Smith was to testify as a witness in the case.

3. That during the time the case was pending the defendant corruptly endeavored to influence Mrs. Smith.

Now, to corruptly endeavor to influence a witness means for an improper motive to make any effort to, to strive to, to try to influence a witness in a way which would impede or obstruct justice.

To pay a witness in order that the witness would not appear, or would testify falsely, or to convey an intimation to a witness that the witness would be paid for not appearing or to testify falsely,



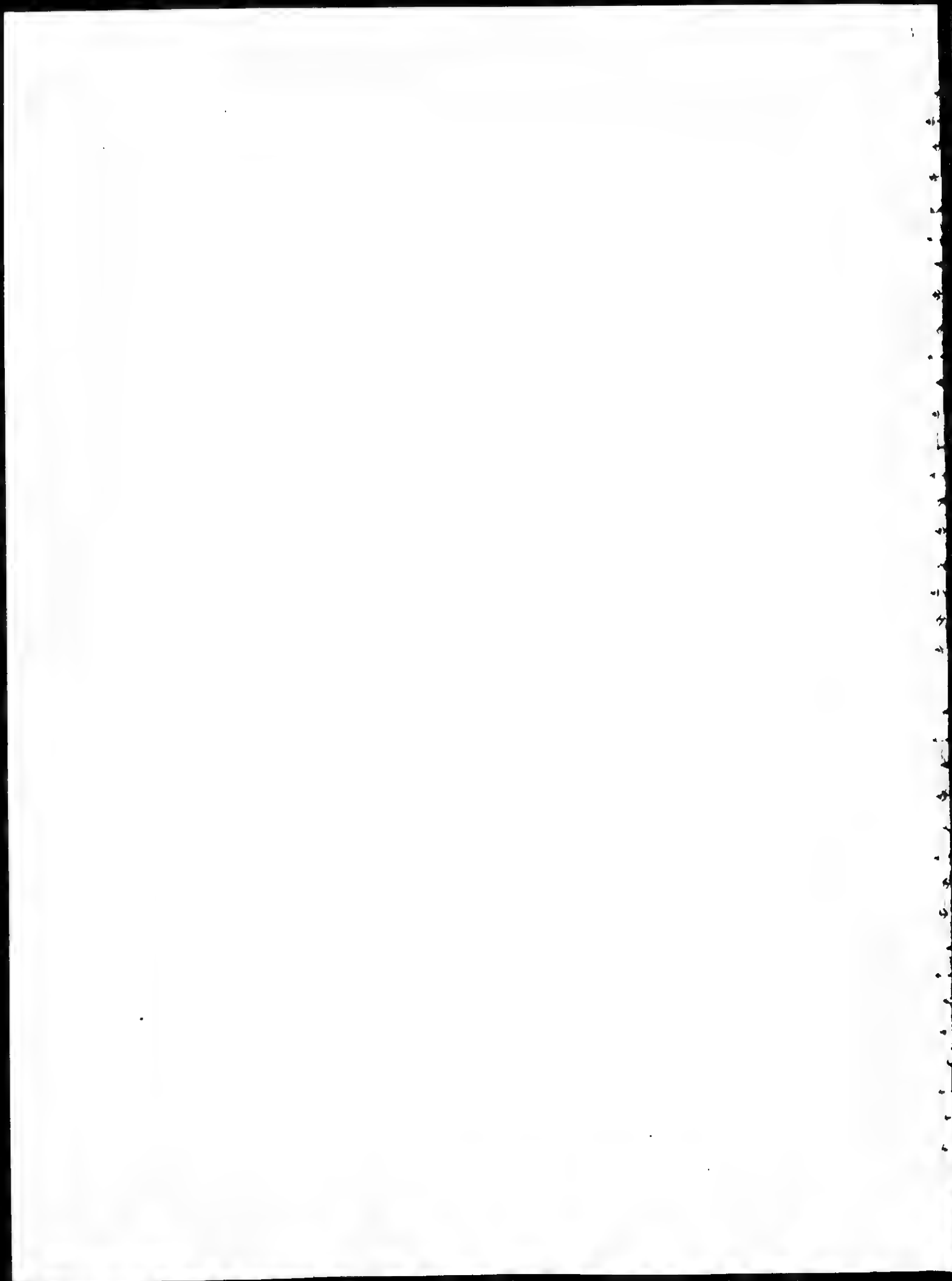
would be to corruptly endeavor to influence that witness. However, the endeavor need not be accompanied by payment or promise of payment of money in order to be corrupt. To make any effort to influence a witness for the purpose of obstructing the due administration of justice -- and by obstructing is meant hindering, retarding or blocking -- is to corruptly endeavor to influence that witness.

Nor is an endeavor necessarily an actual attempt. Any effort to accomplish the evil purpose that section 1503 was enacted to prevent would constitute an endeavor within the meaning of the Statute.

In order to violate this section of the United States Code, it is not necessary to succeed in influencing a witness or to succeed in obstructing the due administration of justice. Corruptly endeavoring to do so, whether successful or not, is sufficient to violate the Statute.

Therefore, in this case it would make no difference whether in fact Mrs. Smith was influenced by the alleged conduct of the defendants nor would it make any difference if Mrs. Smith herself did not wish to testify. Even if Mrs. Smith did not wish to testify an endeavor to influence her for an improper motive not to testify, or to testify falsely, would be sufficient to violate the Statute. Likewise, it would make no difference under the Statute whether the person accused in U. S. versus Forte, Criminal Number 741-61, was guilty or innocent of the charge against him in those proceedings.

Now, with respect to Counts 2 and 4 of the indictment, if the jury should find that a conspiracy to corruptly endeavor to influence Mrs. Smith in fact existed, then any act within the scope of the conspiracy by any one of the conspirators in furtherance of



the illegal purpose of the conspiracy during the time both defendants were members of the conspiracy would be chargeable against the other conspirator as a violation of Title 18, Section 1503, which is treated in Counts 2 and 4.

For example, if the jury should find that Bernice Gross and the defendants Forte and Laughlin were all members of the conspiracy to corruptly endeavor to influence Jean Smith and during the period of their membership in the conspiracy Bernice Gross did some act in furtherance of the conspiracy to violate Title 18, Section 1503, then this act would be chargeable against both Forte and Laughlin as a violation of Title 18, Section 1503.

Likewise, if the jury found that the three above-named persons were all members of the conspiracy, an act by defendant Laughlin in furtherance of the conspiracy would be chargeable to Gross and defendant Forte as a violation of this Statute and an act by Forte under these circumstances, and while all three were members of the conspiracy, in furtherance of the conspiracy would be chargeable to Gross and defendant Laughlin under this Statute.

Now, Gentlemen, before I close, do you wish to come to the bench and note any suggestions or objections or other matters?

AT THE BENCH:

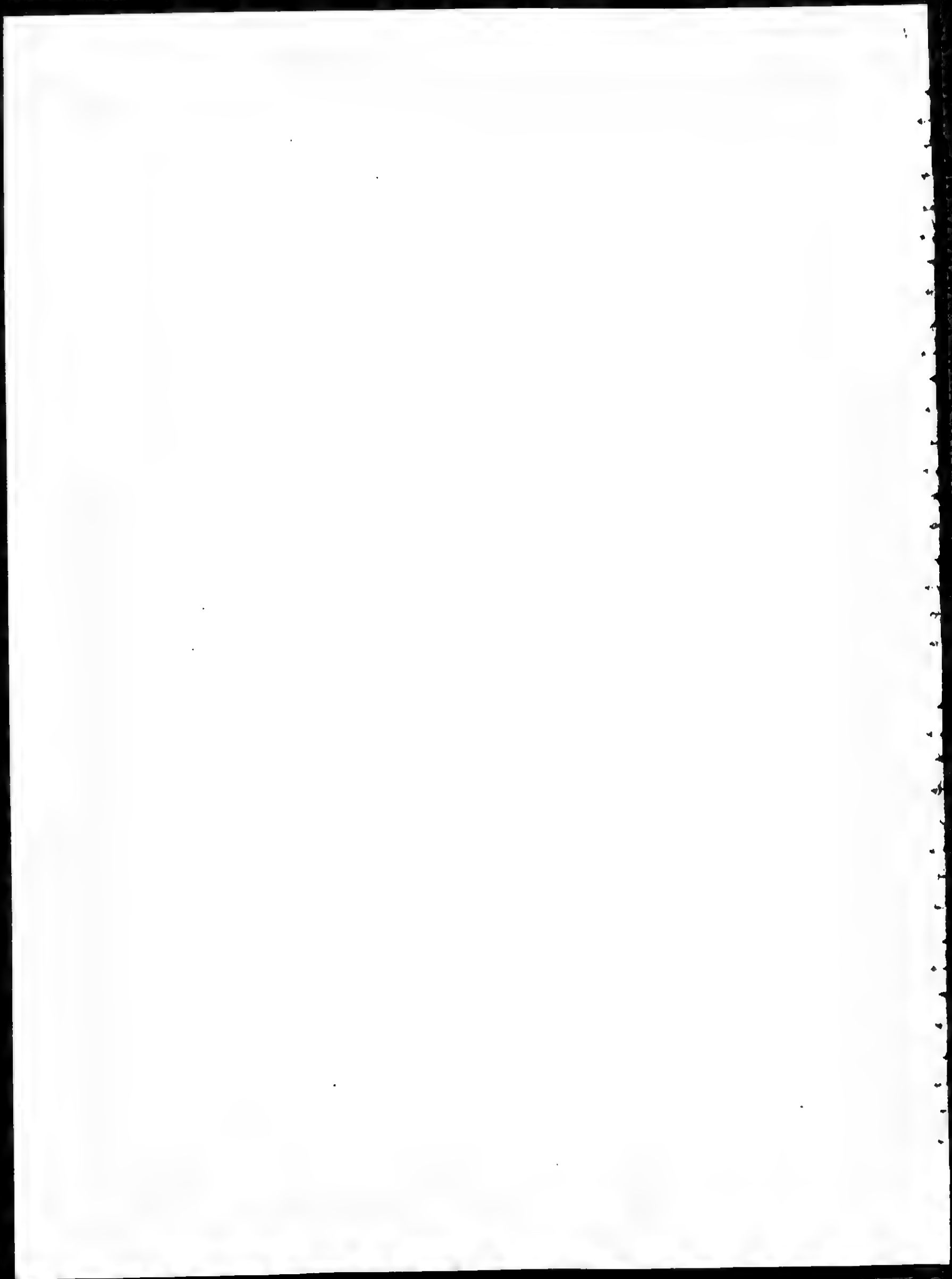
THE COURT: Do you have anything, Mr. Lowther?

MR. LOWTHER: No, sir, no.

THE COURT: Mr. Laughlin?

MR. LAUGHLIN: Your Honor, I renew, on behalf of Dr. Forte, all of the prayers that were tendered and denied.

At the same time I want to renew all motions previously made and have been denied.



I also would ask you to tell the jury -- or course it is included in one of the instructions that was denied -- that any admissions made by Gross after February 20th are admissible only against Gross.

Then I would also ask -- you referred to specific intent in the early part of your instructions as to conspiracy. I ask that you also say as to Count 2 and 4 that requires specific intent.

THE COURT: Well now, you have mentioned a lot of things. All instructions previously denied, all motions previously denied, will be denied again.

I think, as to Counts 2 and 4, I have covered the matter about as adequately as I can and I won't add anything to that.

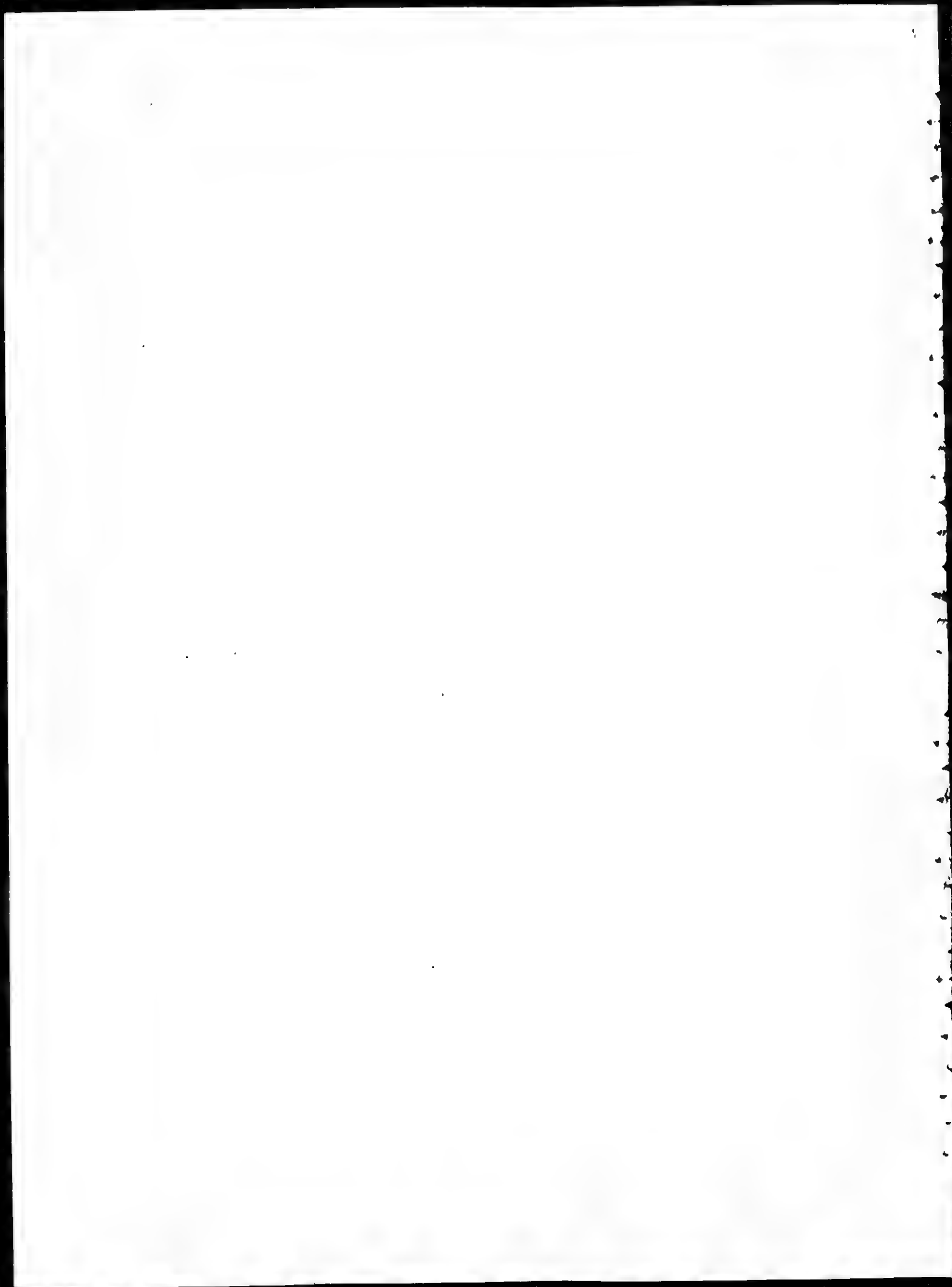
MR. LAUGHLIN: I would also ask you to tell the jury that mere suspicious circumstances are not sufficient to overcome the presumption, that it takes more than mere suspicious circumstances. I would ask that you tell the jury that.

THE COURT: I think that I have covered the burden of proof, and proof beyond a reasonable doubt adequately.

Now, do you have anything, Mr. Garber?

MR. GARBBER: Yes, Your Honor, on behalf of the defendant James Laughlin, I again object to the Court's denial of the tendered instructions, of all tendered instructions which were denied by the Court, and again I urge the Court to grant and read those instructions which were previously denied. That is my first request.

THE COURT: All right, of course the fact is that although I have denied, I think all but one of your instructions, many of the things which you asked have been included in my instructions but those that are not, I deny again.



MR. GARBER: For the purpose of the record then, I would object to the Court's denial of the instructions. I believe that that has to be done.

THE COURT: Yes, all right.

MR. LAUGHLIN: Your Honor, I think under the rules there is something that you have to particularize rather than objecting to an instruction in their entirety. I want to specifically point out that in my judgment your instructions on the law of conspiracy were not complete; they were inaccurate and in my judgment they did not follow the law as set forth in the Supreme Court of the United States.

THE COURT: All right, anything further?

MR. GARBER: Yes, Your Honor, I would request the Court to, in connection with the aspect of the Court's charges on credibility of the witnesses, to instruct the jury that they may also take into consideration in judging persons' credibility whether that person, witness, had an interest in the outcome of the case.

THE COURT: I think I mentioned that.

MR. LOWTHER: You did.

THE COURT: I mentioned that.

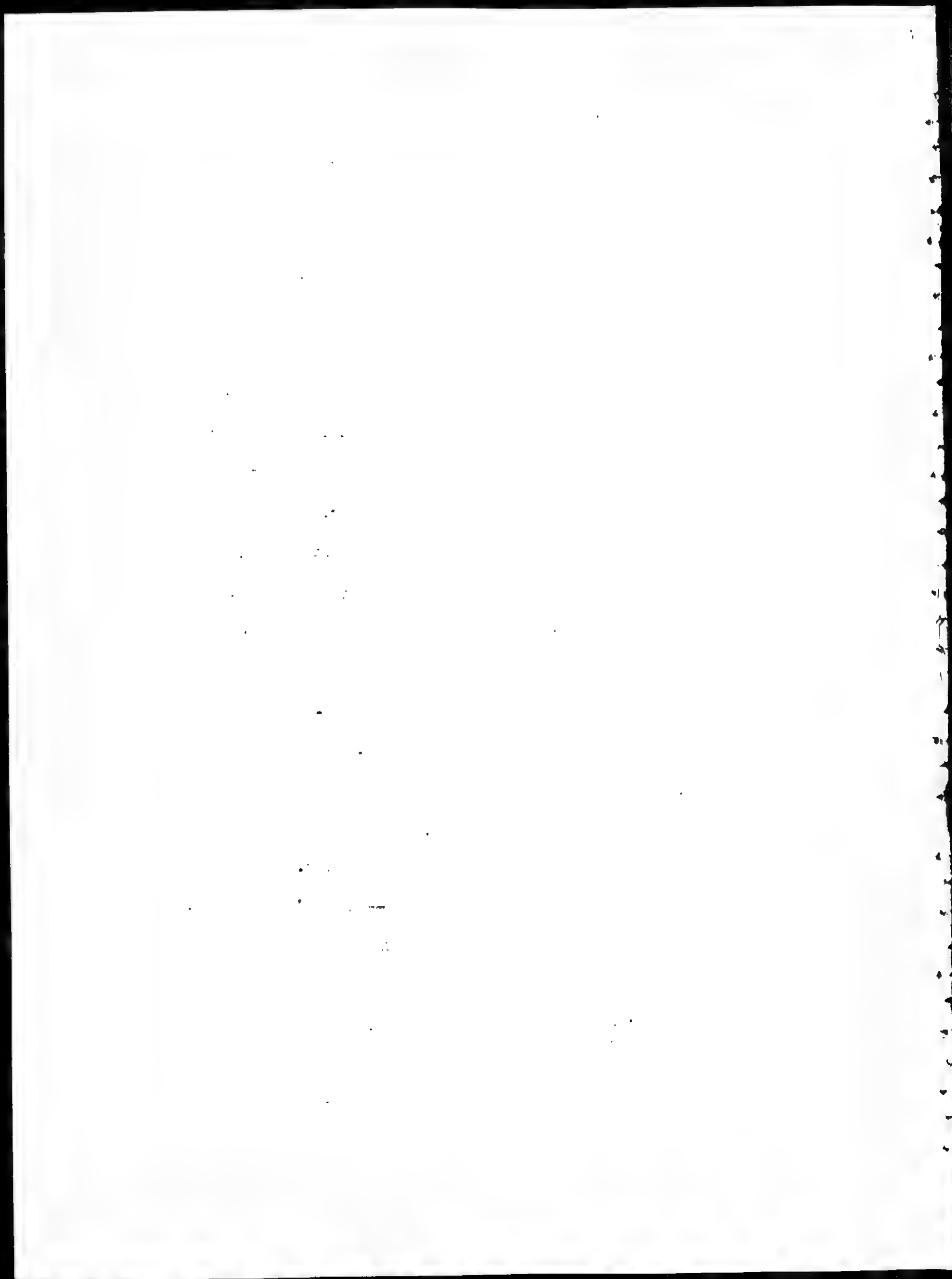
MR. GARBER: I don't recall it, Your Honor.

MR. LAUGHLIN: I recall the other -- I don't recall --

MR. GARBER: I was listening for it and in fact I made a note of it at the time.

THE COURT: Don't tell me I put you to sleep?

MR. GARBER: Well, I hope not. I was trying to be as accurate as possible. I remember the manner that the witness testified, the demeanor on the stand.



THE COURT: Whether the witness has any interest in the outcome of this case.

MR. LOWTHER: And I have recollection of that, Your Honor.

MR. GARBER: Well, it certainly passed me, Your Honor.

THE COURT: All right.

MR. GARBER: Now, I would like to make this further observation:

I would also object to the Court's charge that -- and also request the Court to tell the jury that any statement by an alleged conspirator after the termination of the conspiracy is admissible against the declarant only and that it is not -- could not be admissible against any other person.

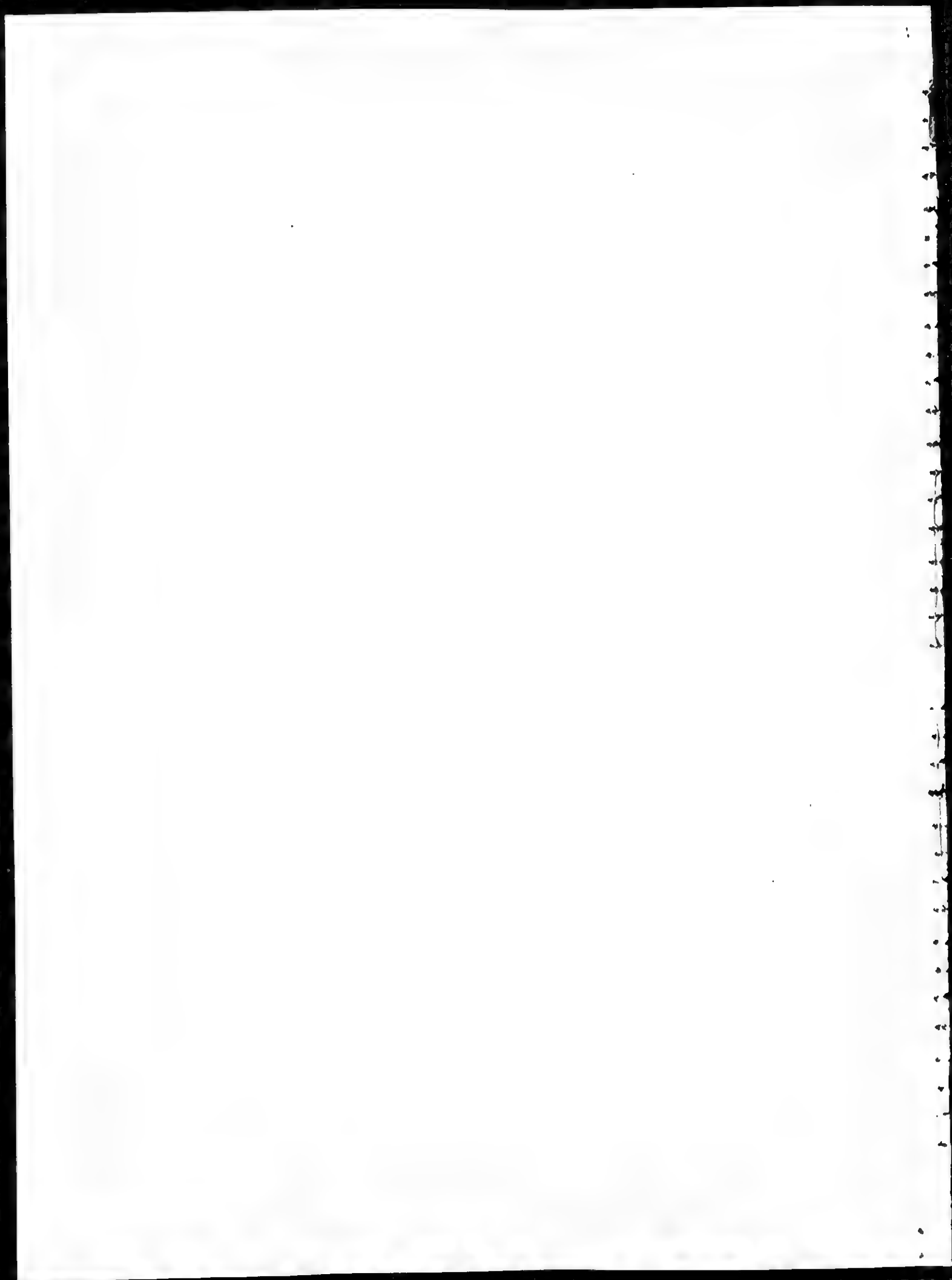
THE COURT: Well, you know, I get fogged up as to what you all are talking about on this.

Now, of course, you take the tapes and I have definitely instructed as to those. The Exhibits 11, 12 and 13; but what I think you and Mr. Laughlin seem to have in mind is that a co-conspirator, after the end of the conspiracy, couldn't even testify in court. Now, if that is what you are talking about, that simply isn't the law.

MR. GARBER: No, Your Honor, that is not my understanding, not the fact that he couldn't testify in Court, but evidence of any statements that he made to a third person.

THE COURT: Well now you call my attention, except for the tapes, 11, 12 and 13, to any evidence in this case which falls in that category.

MR. GARBER: Why, Mrs. Gross' statement on the tapes, things that she said that -- which --



THE COURT: Well, I have said nothing on those tapes may be used as to anybody but Laughlin. Now, if there is anything on those tapes which he said which the jury can get or interpret as an admission of Laughlin that he was in fact a member of the conspiracy when it existed, that would be admissible but as to Forte, I have put all of it out.

Now, is there any other evidence in this case that calls in that category? If there is, I am not familiar with it.

MR. LAUGHLIN: Well, your Honor, it would be any of the testimony, any of the statements of Gross made after February 20th. You see, I have read and reread that Paoli Case which I think --

THE COURT: Well, what statements did she make after February 20th?

MR. LAUGHLIN: Well, her testimony before the Grand Jury.

THE COURT: You read that in.

MR. LAUGHLIN: Well, --

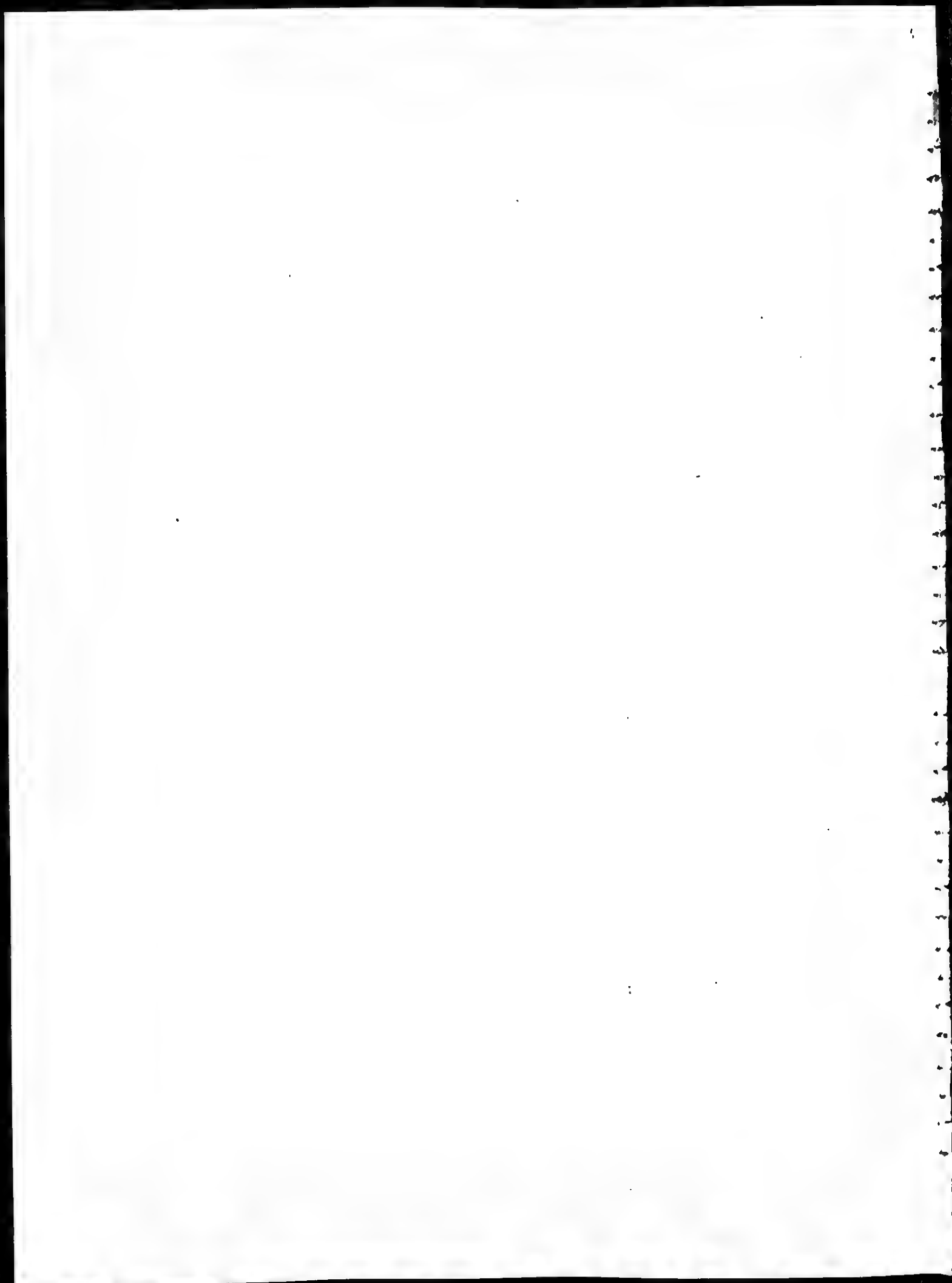
THE COURT: Mr. Lowther didn't read the testimony before the Grand Jury in, you read it.

MR. LAUGHLIN: No, anything that she said, Your Honor, anything at all she said, because -- she made some statement -- if she made some statement before February 20th, that would be something else.

THE COURT: What statement did she make after February 20th not included on Exhibits 12 and 13 and not read in on cross examination by you or Mr. Garber? What statement did I admit that she made after February 20th except those?

MR. LAUGHLIN: Well, Your Honor, anything that --

THE COURT: No, just tell me the statement, not "anything".



MR. LAUGHLIN: The statement that she made, I would say, on March 3rd, two occasions in the Grand Jury.

THE COURT: They were read in by you.

MR. LAUGHLIN: Well, even so that was the foundation of the indictment, Your Honor.

THE COURT: Well, are you going to object to my admitting evidence which you put in on cross examination? This becomes absurd.

MR. LAUGHLIN: No, no, well, anyway, I think it's stated, Your Honor.

THE COURT: Allright.

MR. GARBER: I have one other point, As I heard the Court's instructions finally, with the Court telling the jury that if they found that a conspiracy existed and that one or more of the defendants were members of that conspiracy, any overt act was performed by a conspirator toward the violation of the influencing witness statute, would make one or more of the defendants guilty of the substantive counts?

THE COURT: You did.

MR. GARBER: Your Honor, I would object.

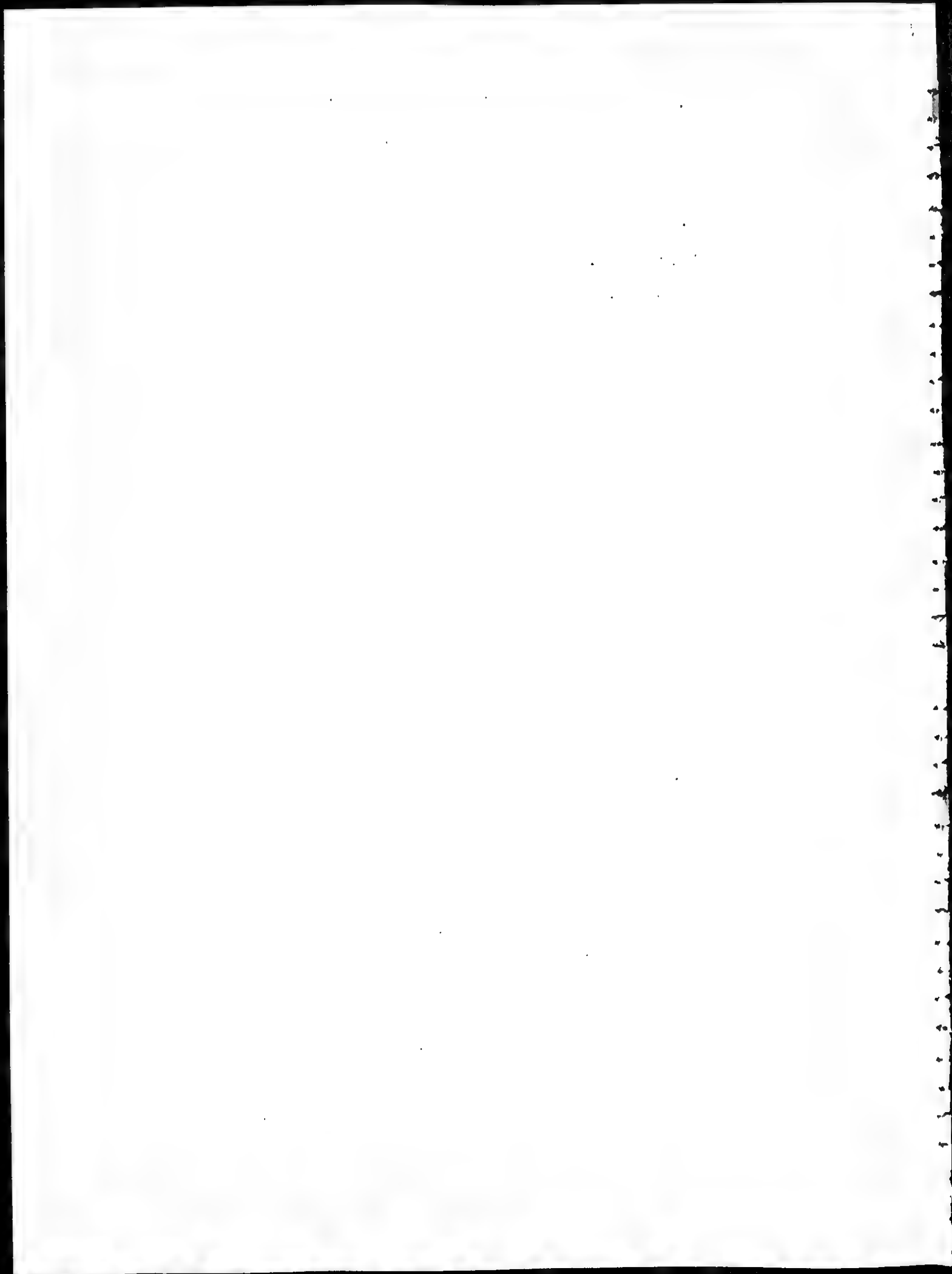
THE COURT: And I have cited to you the cases on which I relied. Did you make a note of them?

MR. GARBER: Yes.

MR. LOWTHER: Pinkerton vs. United States is one of them, Your Honor.

THE COURT: Pinkerton vs. United States and Curley vs. United States, the first being 328 U.S., 640 at page 647; and the second being 81 U.S. Appeals, D.C. 389.

MR. GARBER: Well, on the basis of the Court's charge, I would object to the Court's charge along the lines that I previously



stated on the ground that it in effect makes the indictment duplicitous and that would be the basis of my objection.

THE COURT: I think not.

Anything further?

MR. GARBNER: That's all.

THE COURT: All right, gentlemen.

IN OPEN COURT:

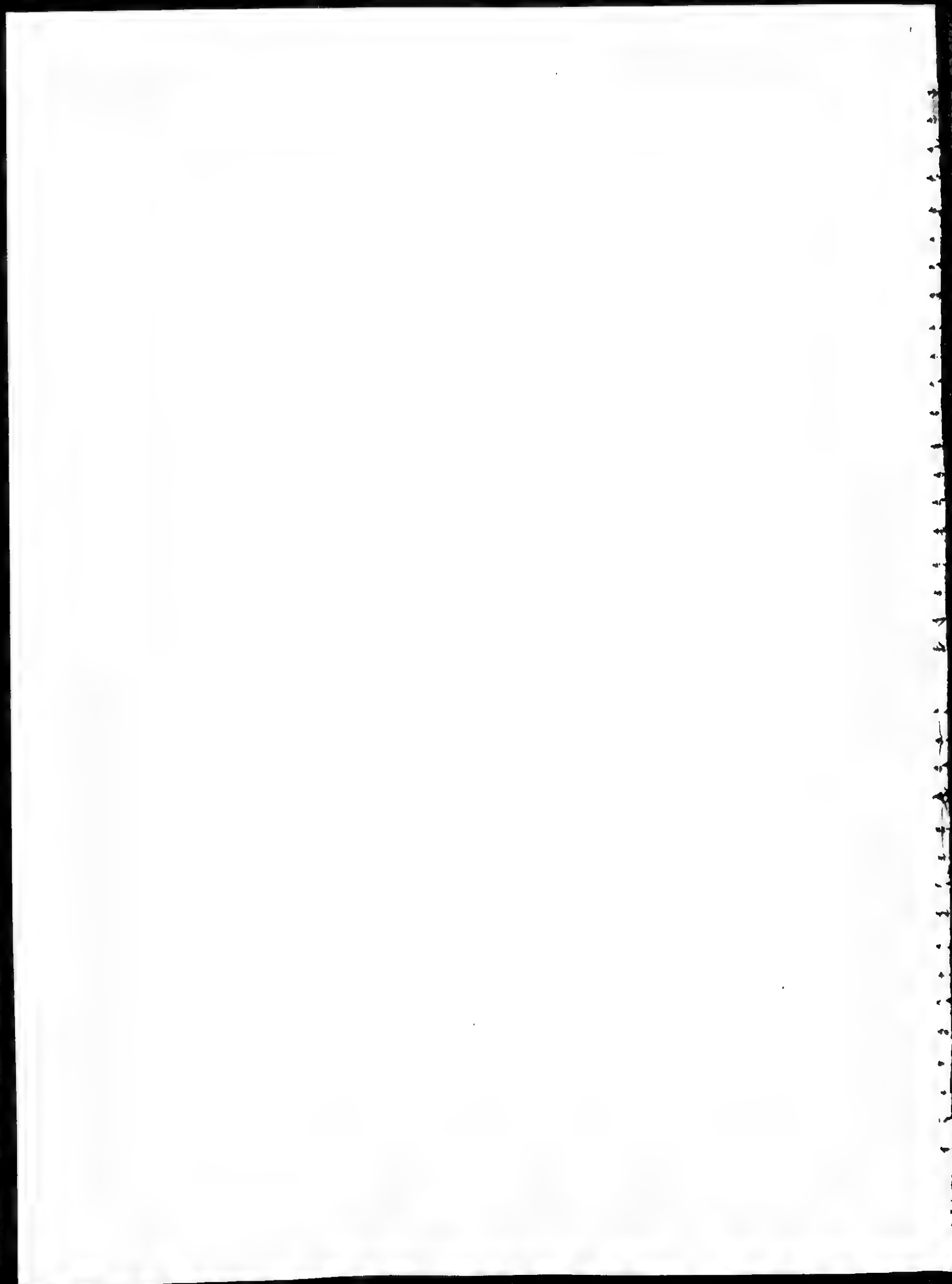
THE COURT: Ladies and gentlemen, you are directed that your verdict must be the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself but do so only after a consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to change an opinion when convinced it is erroneous but do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of the other jurors or for the mere purpose of returning a verdict.

Now, in this case you will be called upon to render a verdict on the first count as to the guilt or innocence of each of the defendants.

Under the first count, you have two possible verdicts as to each defendant. One is "guilty as charged." The other is not guilty. It is possible for you to find under Count 1 both defendants not guilty, both defendants guilty, or one defendant guilty and one defendant not guilty.



Under Counts 2 and 4 -- 2, which charges Forte with the substantive violation of the Statute as I have told you, and 4, which charges Laughlin with the substantive violation of the same Statute -- under 2. you have two verdicts you may bring in as to Forte, either "guilty as charged" or "not guilty."

Under 4, you have two possible verdicts you may bring in as to Laughlin, either "guilty as charged" or "not guilty."

Now, should your foreman have occasion to write a note to the Court, I caution you that the note must never contain a statement as to how the jury stands numerically on any question.

For example, the foreman may not advise the Court that the jury stands 10 to 2, 11 to 1, 7 to 5, on an issue or state in a note to the Court any numerical standing of the jury on any issue except, of course, if and when you reach a unanimous verdict, you may say that you have reached a unanimous verdict.

Does either counsel have any objections to my remarks that I have made since they were at the bench?

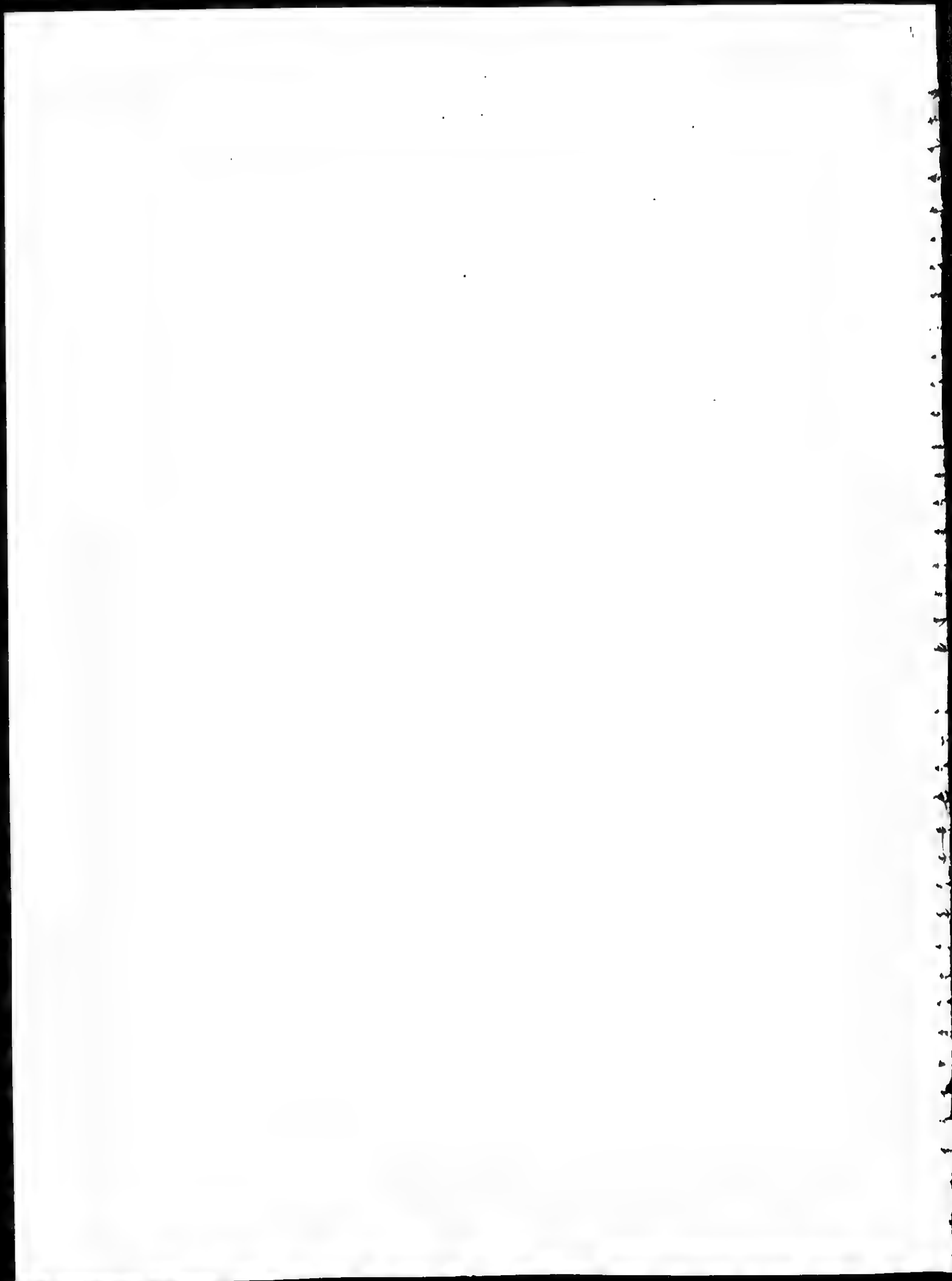
MR. LOWTHER: No, Your Honor.

MR. GARBER: No, Your Honor.

MR. LAUGHLIN: No, we have none.

THE COURT: Now ladies and gentlemen, when you first get to the jury room, as you know, you will elect a foreman or a forewoman to preside over your deliberations and to announce your verdict. Should you desire any of the exhibits in the case, your foreman will send a note to the Court. Any exhibit which has been admitted in evidence and which you request will be sent to you.

At this time I would like to express the deep appreciation and thanks of the Court to the four alternate jurors. You have sat



here with us now for a little over two weeks. You have been attentive to the case as jurors should be. I am sure you know why we have alternate jurors. It isn't really necessary for me to explain to you but I will.

As you know, every defendant is entitled to be charged by a jury of 12 of his peers, meaning 12 of his equals, and if we swore a jury of only 12 people and even at the point we have reached right now, one of the jurors should become ill and unable to serve, then we would have to discharge the jury and start all over again.

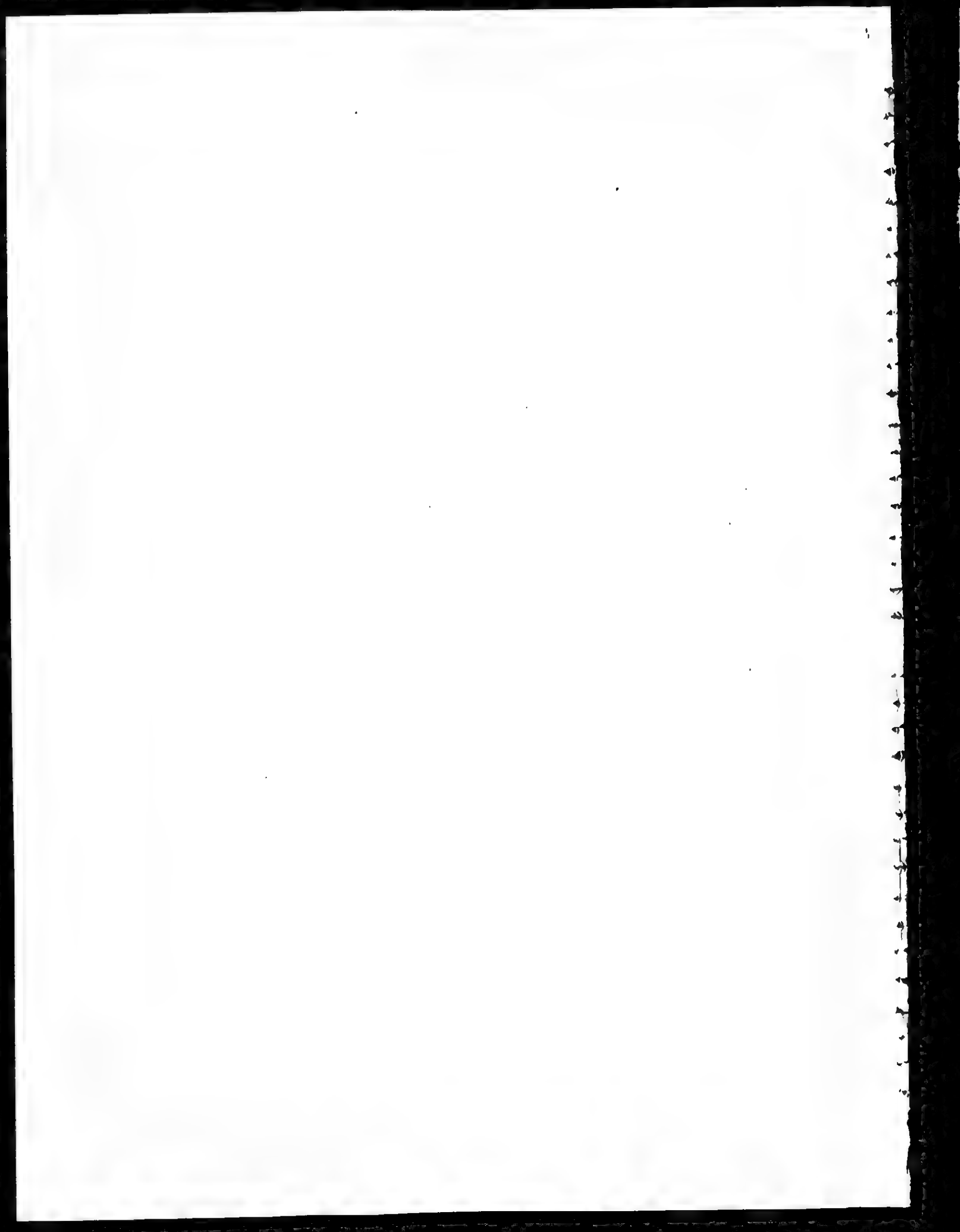
With alternates, with four alternates, four of you ladies and gentlemen of the jury of the first 12 could have become ill and we would merely have substituted an alternate and gone right on without any pause in the trial. So you can see that alternates perform an extremely important function in this Court.

At this time, I express my deep appreciation to the four alternates and you may be excused. Before you go, I will tell you this: You are not required to discuss this case with anyone. No one can cause you to discuss this case after you leave the courtroom. Of course, if you wish to discuss it, you may discuss it but no one can force you to.

With that understanding, I excuse the four alternates at this time, and you may return to the jury lounge. Now, does any of the four of you have anything in the jury room? Would you please get it now and go around the back way.

(The alternates left the courtroom)

THE COURT: We'll have to wait, ladies and gentlemen, till they get out because once a jury has been instructed not even an alternate may be in the jury room with them.



(The deputy marshal indicated that the jury room was clear.)

THE COURT: You may retire and consider your verdict.

(Thereupon, at 11:05 a.m., the jury retired to consider their verdict.)

MR. LAUGHLIN: Your Honor, I assume it would be all right to return to the office, return on phone call.

THE COURT: If that means you are going back uptown, Mr. Laughlin, to the National Press Building, no, because I don't know when the jury may come in with a request for something. Of course, all counsel must be present.

Now, if you put yourself on phone call in this building, it is all right.

MR. LAUGHLIN: Very well.

THE COURT: But the Press Club, if someone sends a note in here, I don't want to have to wait to get you down from the Press Club

MR. LOWTHER: If Your Honor pleases, I wonder, might we have an agreement amongst the defendants and counsel that if the jury asks for any or all of the exhibits that they may have them without calling counsel back into court?

THE COURT: I'd rather not do that.

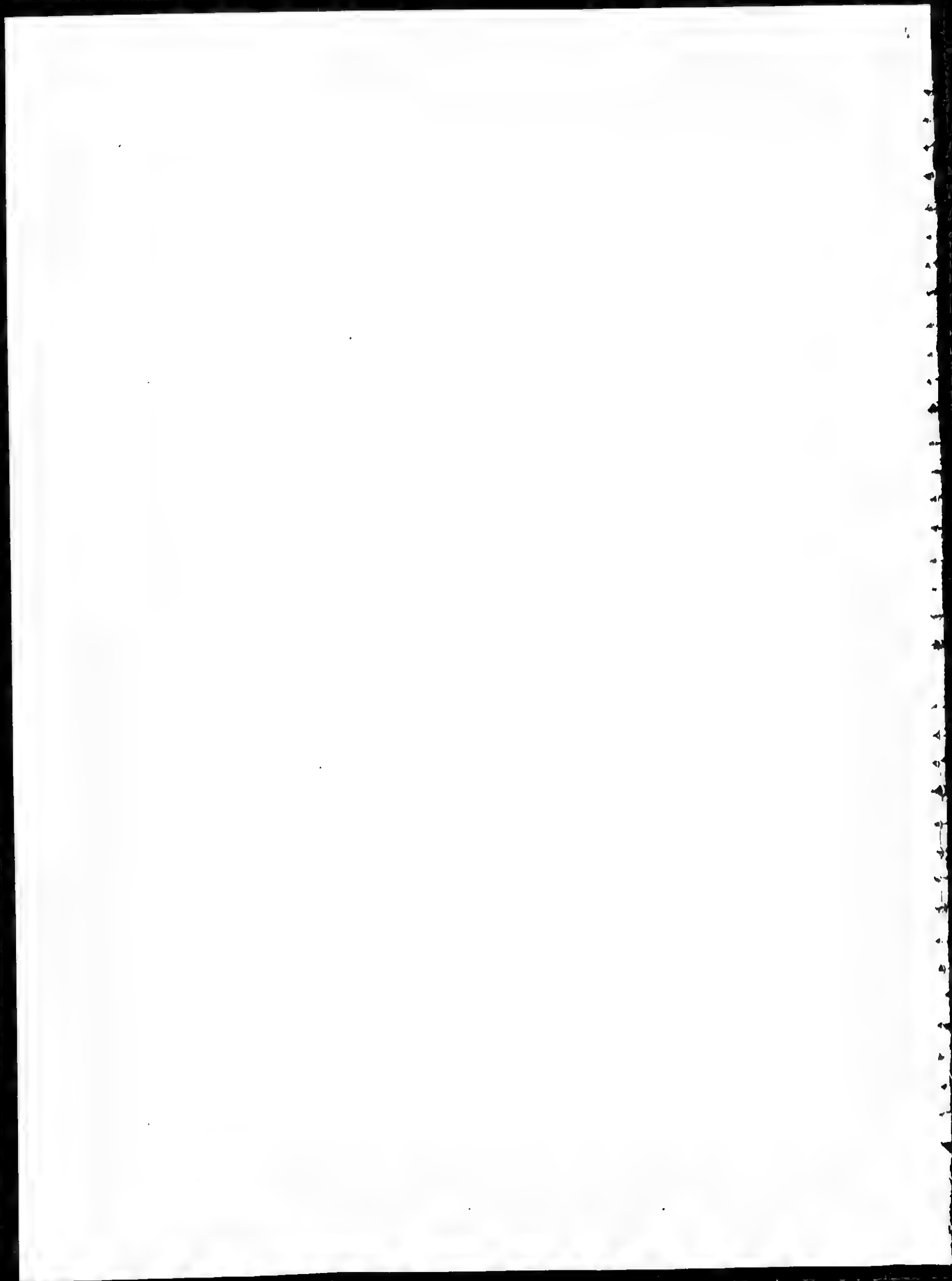
MR. LOWTHER: Very well, sir.

THE COURT: Any note I get from the jury, I wish to take up with all counsel.

MR. LOWTHER: Very well, sir, thank you.

THE COURT: So I wish all of you would leave your telephone number in the courthouse so we can get you together in five minutes at the most.

MR. LOWTHER: Yes, sir.



(Thereupon, at 11:06 a.m., the aforecaptioned proceedings were recessed until 4:00 p.m., the same day, when the following proceedings were had:)

THE COURT: Wait a minute; is there a marshal out there?

THE DEPUTY MARSHAL: Yes, sir.

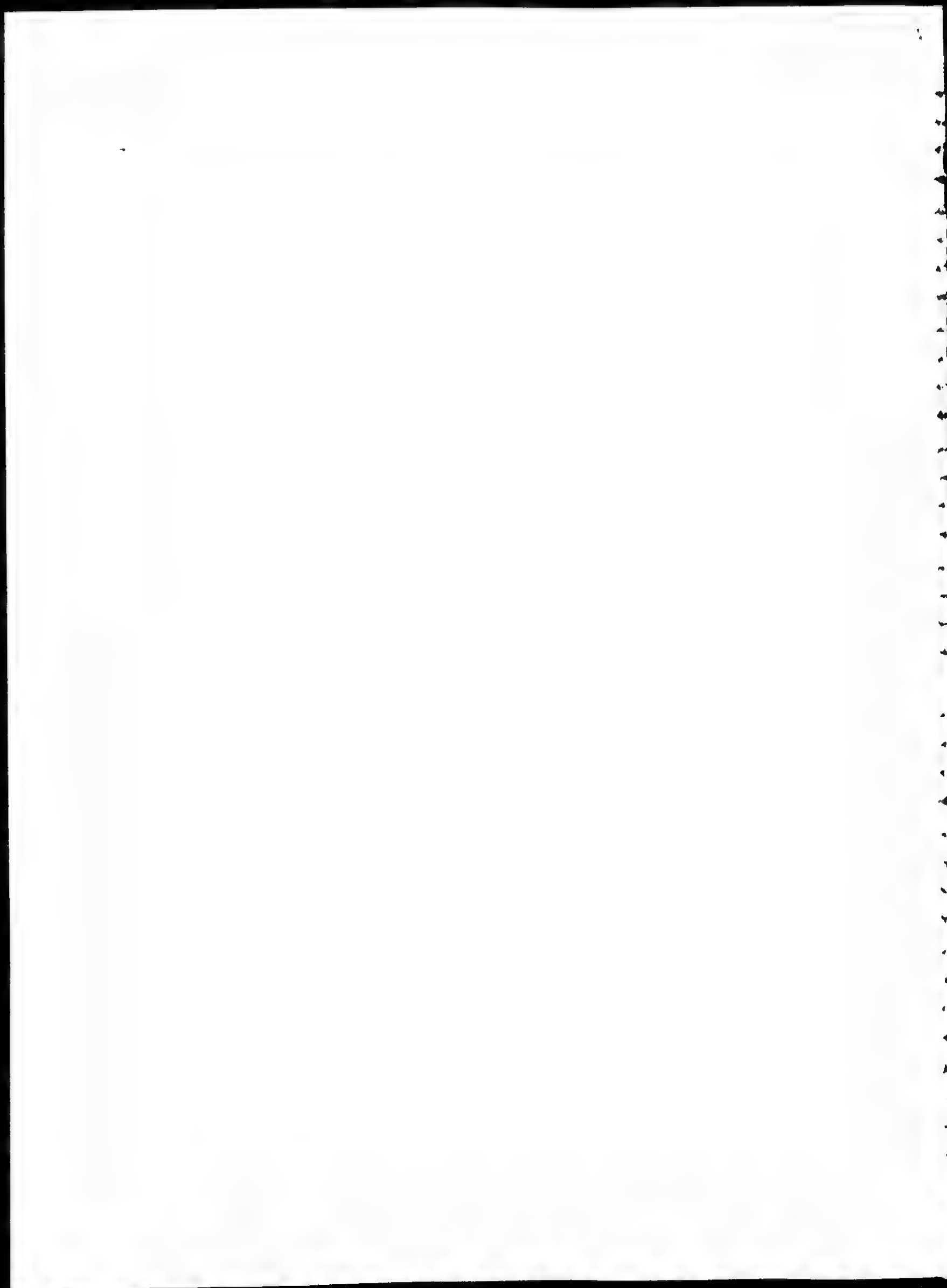
THE COURT: Tell them to let anybody come in who wants to come in and then not let anybody come in during the taking of the verdict.

All right, bring the jury in.

(The jury was brought in and the following proceedings were had:)

DEPUTY CLERK: Will the foreman of the jury please rise.

Mr. Foreman, has the jury agreed upon a verdict?



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

ALLAN U. FORTE
and
JAMES J. LAUGHLIN.

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Criminal No. 600-63

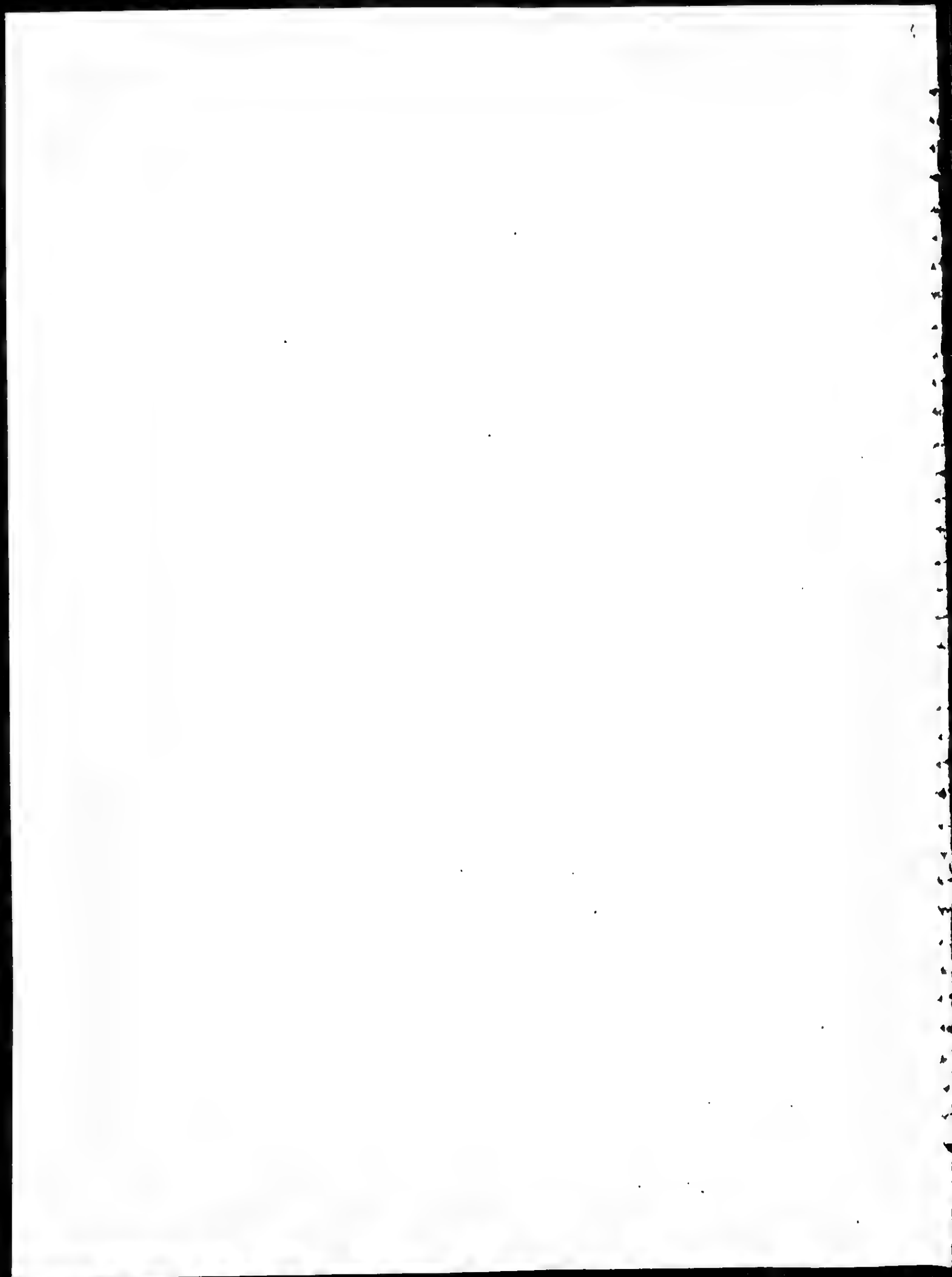
Filed May 5, 1964

MOTION FOR NEW TRIAL

Now come the defendants and move the Court for an order setting aside the verdict in this cause and granting a new trial.

In view of the situation existing in this case, we ask that the trial judge confer with a board of judges -- or in any event, with at least one other judge of the United States District Court for the District of Columbia for the reason that the points involved are so clear cut and defined that no one versed in the law can dispute the validity of the contentions. The trial judge in this case was so palpably wrong and so full of malice and venom that it appeared he was unwilling -- and in fact steadfastly refused -- to follow the settled law of this and other jurisdictions. We will take up the matter point by point, and in outlining our points we will strictly conform to the record and refer to the matters that are already in the pleadings, or have been brought forth in open court:

1. Before the trial got under way and since it appeared that the trial judge was determined to have admitted in evidence certain tape recordings which were not admissible under the rule laid down by the Supreme Court of the United States in Weiss v. United States, 308 U.S. 321, there was filed against him an affidavit of bias and prejudice. This affidavit was prepared strictly in



accordance with the statute. The affidavit set forth that the trial judge, before he was appointed to the Bench, was closely allied with the Police Department and obtained many, many favors from the Police Department and in fact had a favored entree into the councils of Police administration. Since the integrity of the Police Department was involved in this case, it was apparent to the defendants that the trial judge could not overcome his close affinity with the Police Department. The affidavit set forth this:

"The said judge on or about June 1959 approached affiant (James J. Laughlin) and asked affiant if he would testify in his behalf before the Judiciary Committee of the United States Senate."

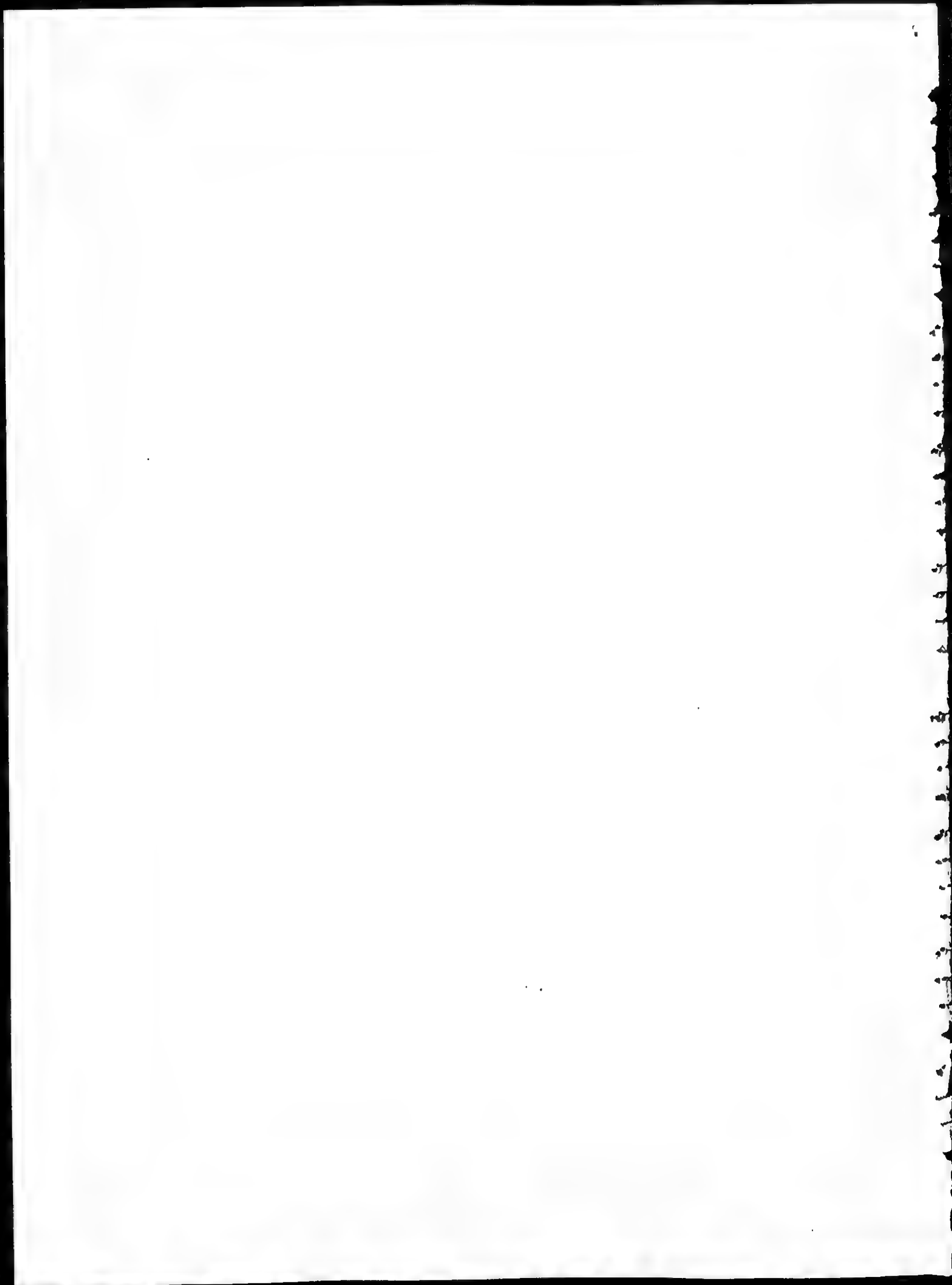
The affidavit set forth further:

"The said judge stated that he had been criticized because of his opposition to the Mallory Rule as announced by the Supreme Court of the United States and stated that he had tried very few criminal cases and since affiant's experience in the field of criminal law had been quite extensive, the said judge felt that affiant's testimony would be helpful."

Defendant Laughlin did testify before the Judiciary Committee of the United States Senate on June 16, 1959 and stated he could give only a qualified endorsement to Judge Hart due to the fact that he had consistently condemned the Mallory Rule and had advocated almost unlimited interrogation of suspects while in police custody. At the time of the hearing Senator Eastland of Mississippi came to the defense of Judge Hart and criticized defendant Laughlin for opposing him. It was brought out at the hearing by the then Senator from Colorado, Honorable John A. Carroll, that Judge Hart did have very close ties with the Police Department. Senator Carroll raised the question as to whether in view of Judge Hart's close affinity to the police that he could do justice on the bench when the rights of an accused were at stake.*

In the course of the hearing, Senator Carroll in referring to Judge Hart said:

* See proceedings before Judiciary Committee of the United States Senate June 16, 1959 and July 1, 1959.



"Does he have a personal relationship with the Police Department? Does he manifest great interest in Police work? Was he in constant contact with the Police Department?"

When Judge Hart's law partner was testifying on behalf of Judge Hart, Senator Carroll said:

"You would want a man, would you not, thinking like a judge, and not a judge thinking like a policeman."

The partner answered:

"I couldn't agree with you more."

The law partner of Judge Hart could only refer to one criminal case that Judge Hart had handled. During the hearing Senator Carroll brought out a previous statement of Judge Hart as to suppressing evidence illegally obtained. Judge Hart had stated:

"There are many students in the law. There are many lawyers who feel merely because evidence is illegally obtained it should be thrown out and the guilty man go free."

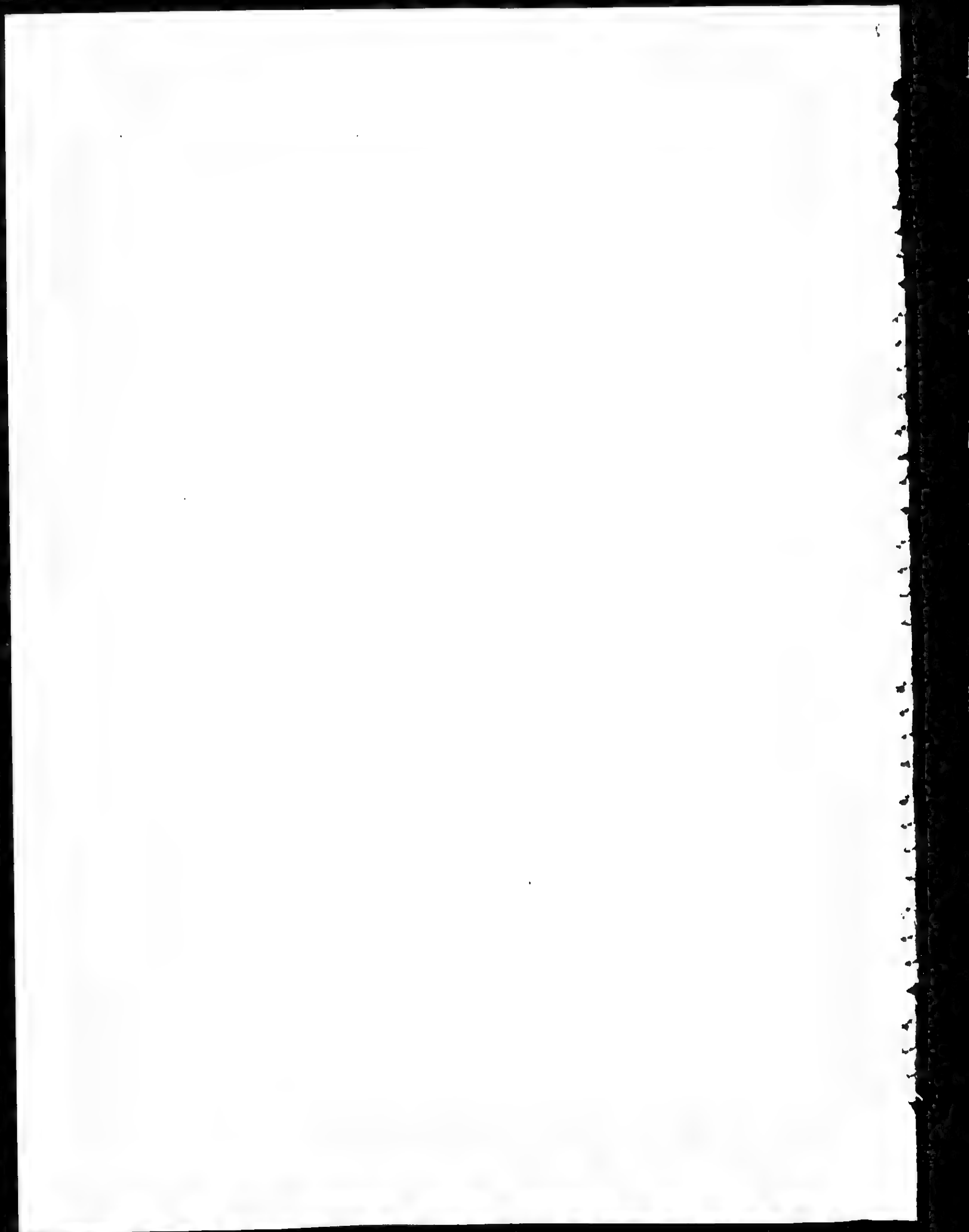
It is a matter of record that lawyers practicing before Judge Hart very rarely indeed have a motion to suppress unlawfully obtained evidence granted.

Defendants say that when the affidavit of bias and prejudice was filed in this cause it stated that:

"* * proceedings against him were not brought in good faith. The indictment against affiant was due to a concerted and organized effort on the part of certain members of the United States Attorney's office to protect a police officer, one Samuel E. Wallace. In Criminal Case No. 741-61 there was testimony that the said Wallace had solicited a bribe from Allan U. Forte, co-defendant herein, and the said Wallace denied that he had solicited a bribe. A motion was filed to compel both Forte and Wallace to submit to a lie detector test at the hands of the Federal Bureau of Investigation. Defendant Forte agreed to take the test. Wallace has at all times refused to take the test."

And the affidavit said further:

"Affiant says in the instant case it will be necessary to show that although the said Wallace was himself a target of



investigation, he was virtually permitted to take over the inquiry, and that he was permitted to interview witnesses before they were taken to the grand jury room and said Wallace also requested that certain witnesses should take lie detector tests."

And the affidavit said further."

"Affiant says that it is his belief that Judge Hart, due to his close affinity to the police as already referred to, will endeavor in every way possible to protect Wallace and to rule out any attempt on the part of the affiant to bring to the attention of the jury the role played by Wallace and others allied with him in this case."

Defendants say that after the affidavit of bias and prejudice was filed, the trial judge refused to disqualify himself and stated that the allegation contained in the affidavit of bias and prejudice was an untruth. On April 17, 1964 defendants asked Judge Hart to withdraw the remark. The said judge refused to do so and again reiterated and reaffirmed his statement. Of course it is well recognized that a judge cannot go into the truth or falsity of an affidavit.

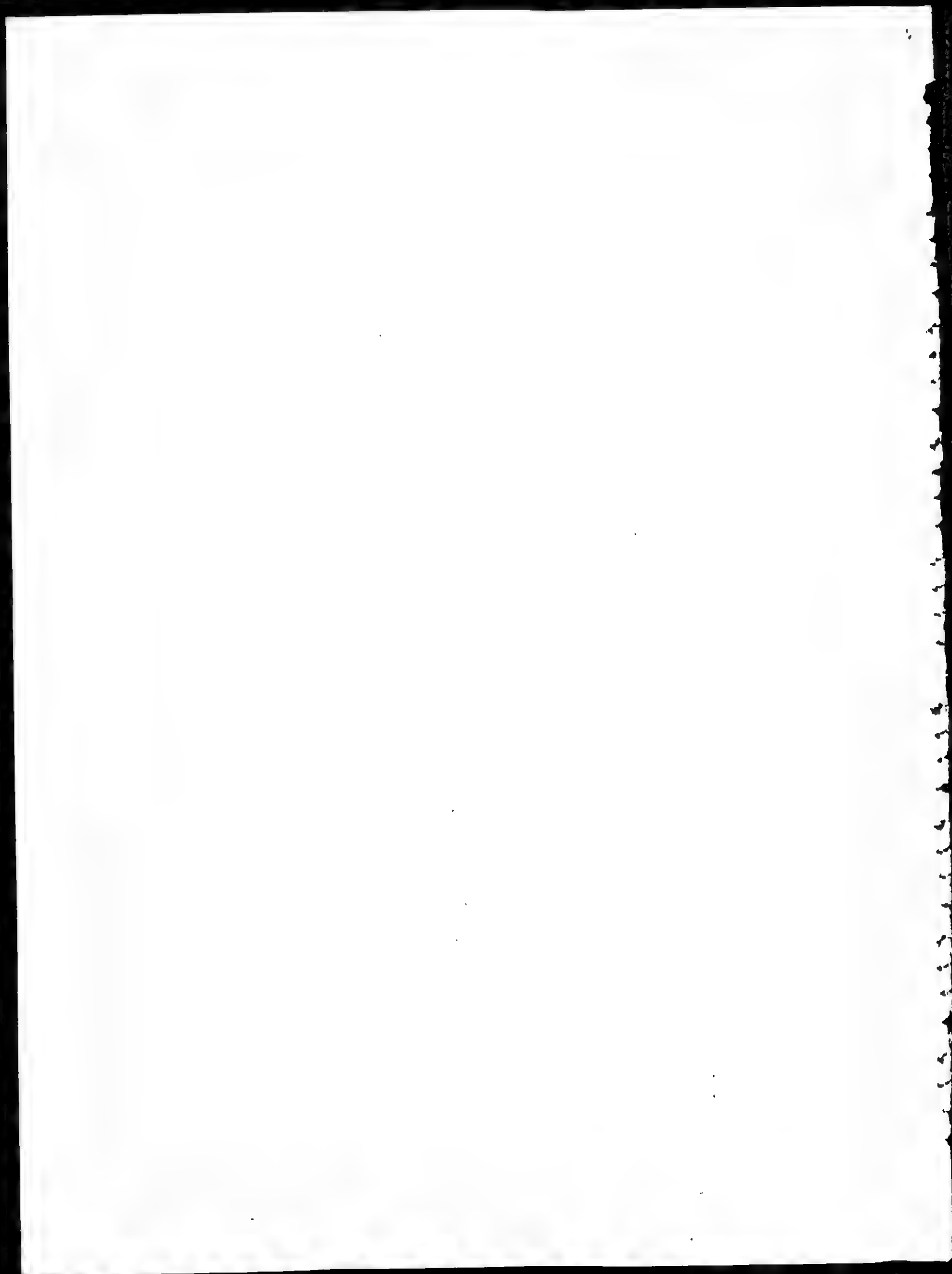
As a result of the attitude of the trial judge, a supplement was filed to the affidavit of bias and prejudice. The supplement said this:

"Affiant says he does not know why the said judge denies the allegation. Affiant says that it is true that the said judge did approach him in the National Press Building and did ask him to testify as set forth in the affidavit of bias and prejudice."

And in order to refresh the recollection of the trial judge the supplement to the affidavit of bias and prejudice said this:

"Affiant says it may refresh the recollection of the said judge when affiant points out that on another occasion in the office of the said judge ****that the said judge asked affiant to see Senator William B. Jenner who was then on the Judiciary Committee of the United States Senate to block the reappointment of a judge of a lower court for whom the said judge expressed a personal dislike and that the said judge stated he would like to see the reappointment blocked."

The Judge in question was the Honorable George D. Neilson, then serving on the Municipal Court, now the Court of General Sessions. At the time the supplement to the affidavit of bias and prejudice was filed we were unable

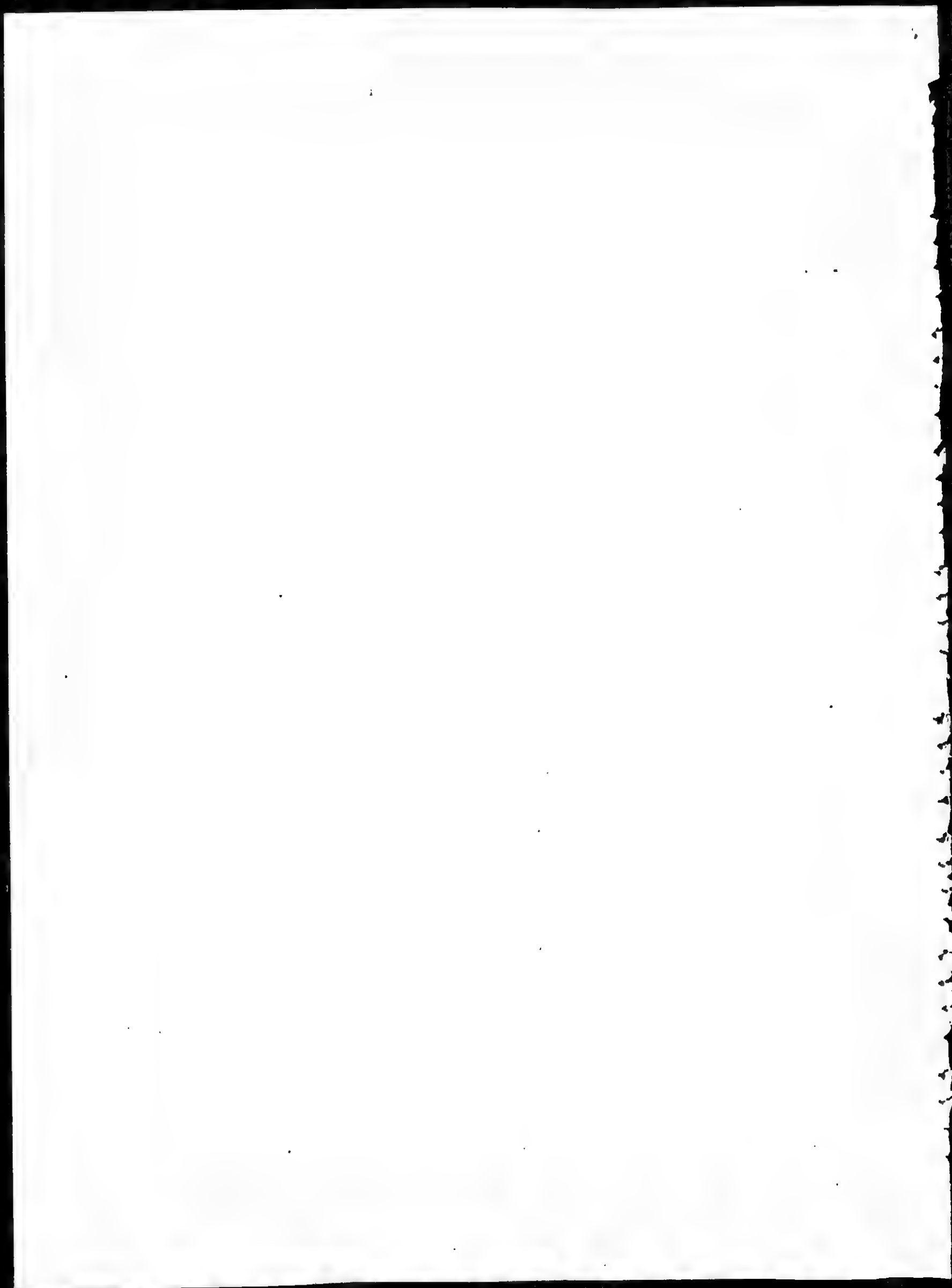


to understand why the case was sent to Judge Hart. He was not assigned as one of the judges sitting in Criminal Court but had been assigned to Motions Court No. 2.

Therefore, it is clear from the record that the trial judge made a mockery of the administration of justice in the trial of the case. He refused to permit any testimony showing any misconduct on the part of Sgt. Wallace of the Police Department and any misconduct at the hands of the United States Attorney's office.

2. The trial judge apparently was determined to admit in evidence certain tape recordings. These recordings had been ruled inadmissible by Judge Youngdahl. See United States v. Laughlin, 222 F. Supp. 284. These tape recordings also were ruled inadmissible, as obtained in violation of the Federal Communications Act, by Judge Curran. See United States v. Laughlin, 223 F. Suppl. 623. Of course under existing law the trial judge was bound by the rulings of Judge Curran and Judge Youngdahl. He was without power to overrule these judges. As a matter of fact the recordings were arranged by Samuel E. Wallace, himself a target of investigation. And the testimony even before Judge Hart indicated emphatically that the consent of one Bernice Gross was not voluntarily given but she had been reminded that she had committed acts of perjury and was subject to indictment for perjury. All of this was with the cooperation and in conjunction with one Harold J. Sullivan, of the United States Attorney's office, one Joseph M. Hannon of the United States Attorney's office, and David C. Acheson, United States Attorney. The trial judge was determined of course that these tapes would be played and he disregarded not only existing law but the rulings of Judge Curran and Judge Youngdahl. In fact in DeMaurze v. Swope, 110 F. 2d 564, we find this:

"It is highly indiscreet and injudicious for one judge of equal rank and power to review identical matters passed upon by his colleague."

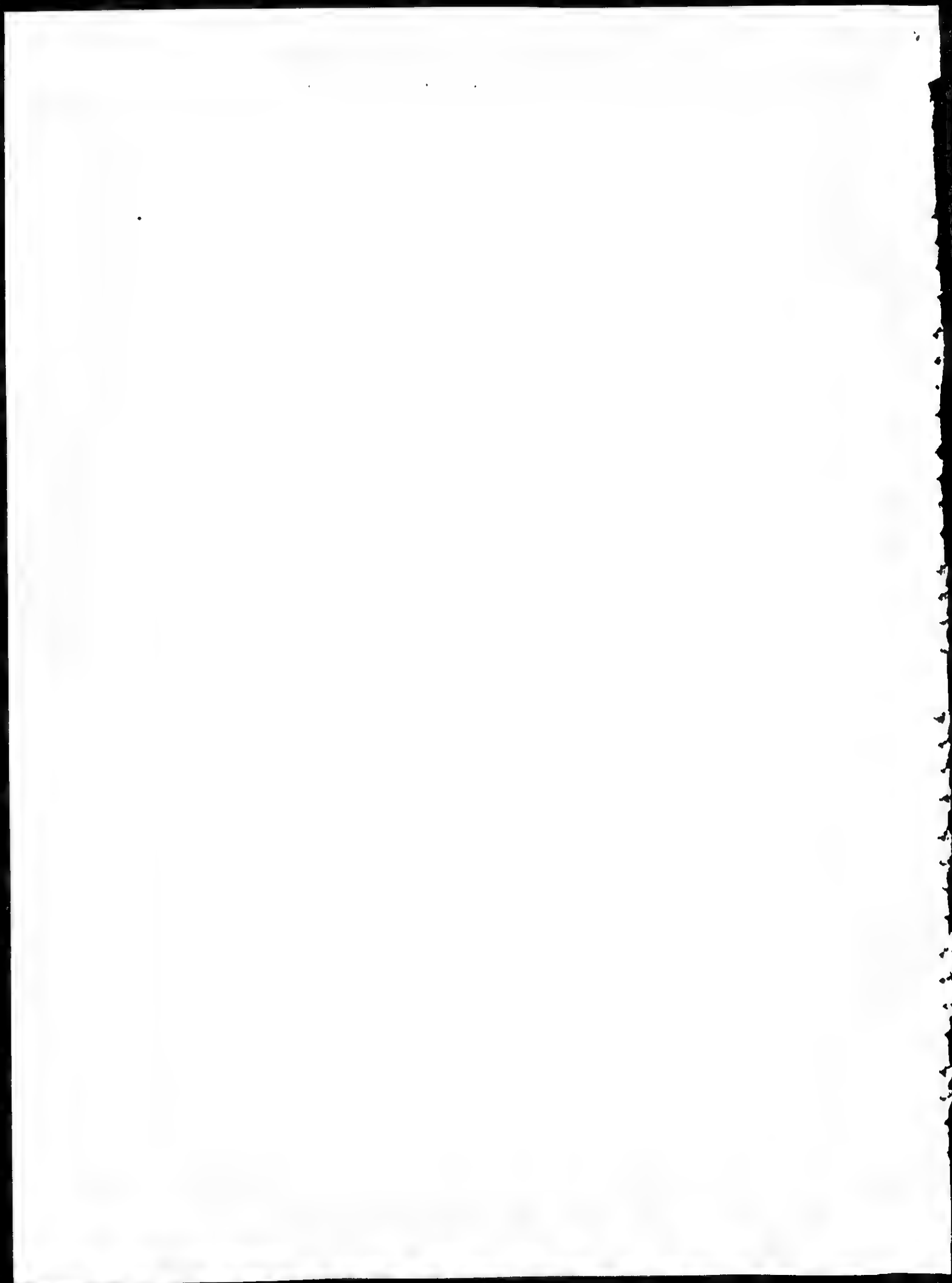


And in Donnelly Garment Co. v. N.L.R.B., 123 F.2d 215:

"Judges of the same court will not knowingly review, reverse or overrule each other's decision."

3. The testimony of one Bernice Gross was not admissible in any event to prove a conspiracy and in fact was not admissible for any purpose. The rule is well settled that a confession or declaration made by a co-conspirator after the termination of the conspiracy is admissible only against the declarant. Only a cursory reading of the authorities would convince the trial judge that this is the law. See Delli Paoli v. United States, 352 U.S. 232; 77 S.Ct. 294. This was stated to the trial judge so many times that it finally became a waste of breath to mention it again. The trial judge was convinced that the tapes not only would be played but replayed and in fact perpetrated a situation that has no parallel in the annals of Federal criminal jurisprudence. When arguments got under way, without any notice to the defendants, the trial judge permitted these tapes to be played and then stated that he knew nothing about it. Of course he had to know about it because it is unthinkable that any prosecuting official should attempt such a departure from fundamental fairness without first making a request of the Court out of the hearings of the jury and with opportunity of the defendants to be heard. We believe a search of the records will show such a spectacle has never before been attempted in the Federal courts.

There are so many other points substantial in nature that time will not permit to set them forth in detail. However, the matter of telephone monitoring in violation of the Federal Communications Act is important and can be attacked on another ground. Defendant Laughlin, at the request of the Assistant United States Attorney, testified before the Grand Jury. His testimony was in the main as to the misconduct of Detective Wallace. Defendant Laughlin was led to believe at that time that there would be an honest and legitimate

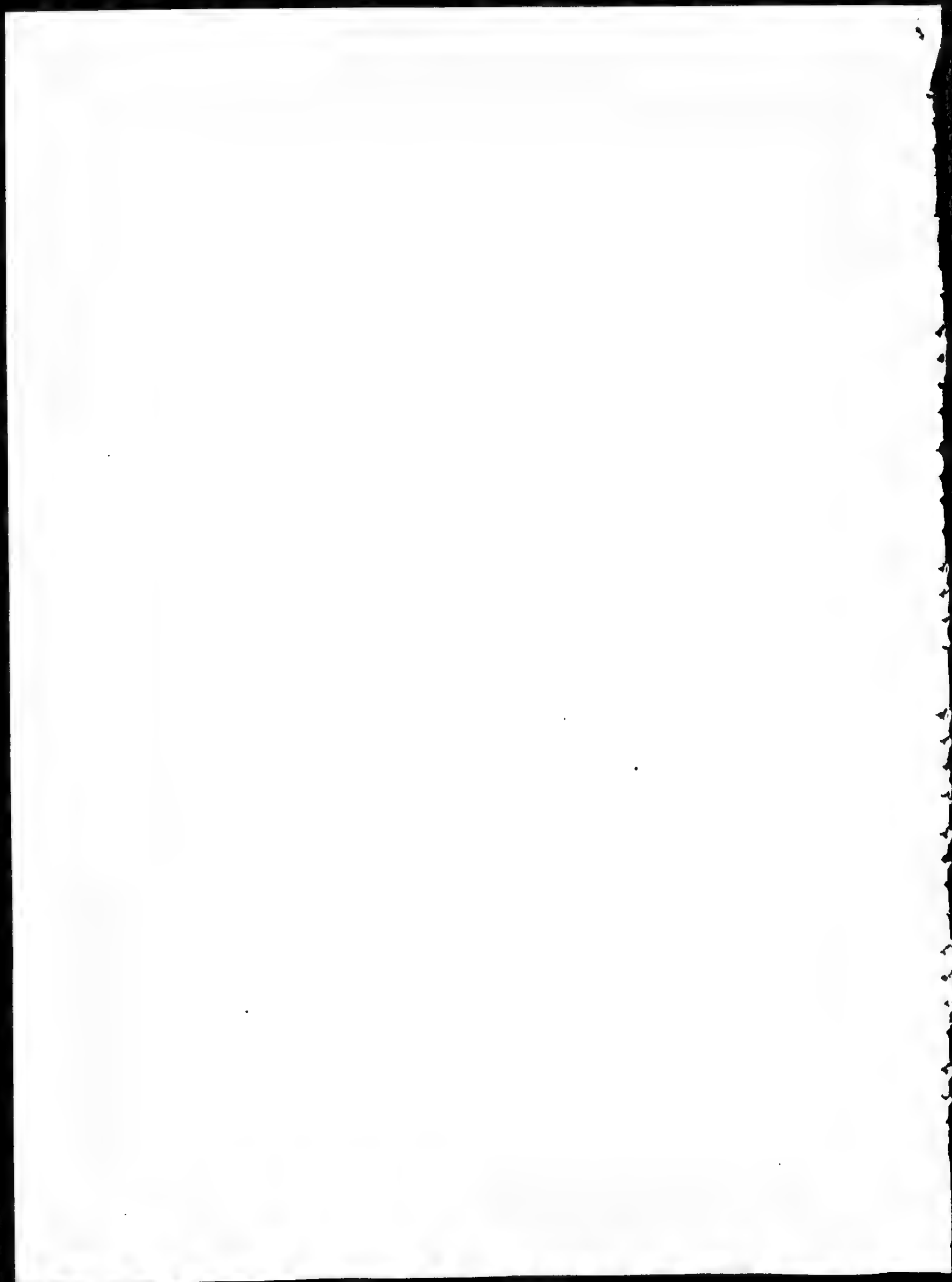


inquiry into this matter. However, the Assistant United States Attorneys Sullivan and Hannon, with the approval of United States Attorney Acheson and in conjunction with Detective Wallace -- himself a target of investigation -- virtually continued the Grand Jury testimony of the defendant Laughlin by the monitoring of telephone conversations in violation of the Federal Communications Act and also violated all concepts of due process and fundamental fairness in that there was abuse of Grand Jury procedure and Grand Jury process and since the pleadings already set forth that the Grand Jury was biased, that alone would be sufficient to dismiss the indictment.

There are many, many other important points but we believe it is unnecessary to set them forth in detail in this motion.

However, before concluding we again desire to point out that we are unable to understand how this case came to Judge Hart. He was not listed as a judge sitting in the Criminal Court. In fact he was listed as a judge sitting in Motions Court No. 2. We were never notified that there had been a change in the assignment of Judges and it now appears that with the trial of the defendants concluded, the trial judge has taken his rightful place in the Court's assignment and is no longer in the Criminal Branch of the Court. Therefore, the question remains, did Judge Hart reach out for this case.

As stated above, there are so many other points substantial in nature that no good purpose would serve to enumerate them here. The above points are not only substantial but absolutely reversible and while we realize the trial judge is full of venom and malice as a result of defendant Laughlin's testimony against him before the Senate Judiciary Committee on June 16, 1959, the defendants make the request that the trial judge confer and consult with several judges of the District Court or, in fact, any other judge of District Court in order to reason and be reasoned with, and if he will diverse himself



from prejudice he must realize the unfairness of the trial and the necessity for a new one.

/s/ James J. Laughlin
James J. Laughlin
National Press Building
Washington 4, D. C.
Counsel for Defendant
Allan U. Forte

/s/ William J. Garber
William J. Garber
412 Fifth Street, N.W.
Washington 1, D.C.
Counsel for Defendant
James J. Laughlin

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of May, 1964 mailed copy of the foregoing Motion for New Trial to David C. Acheson, Esq., United States Attorney, U.S. Court House, Third and Constitution Avenue, N.W., Washington, D. C.

/s/ James J. Laughlin
James J. Laughlin

BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

No. 18,711

JAMES J. LAUGHLIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 18,712

ALLAN U. FORTE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 23 1964

Nathan J. Paulson
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Of Counsel

William J. Garber
412 Fifth Street, N.W.
Washington 1, D. C.

JAMES J. LAUGHLIN
National Press Building
Washington, D. C.
Counsel for appellants.

(1)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the doctrine of collateral estoppel is applicable to criminal cases.

2. Whether the telephone recordings used in evidence violated existing departmental regulations.

3. Whether the telephone recordings in this case violated the constitutional rights of the appellants.

4. Whether telephone recordings constituted invasion of privacy.

5. Whether the admissions, declarations and confessions of an alleged co-conspirator can be received in evidence, made after the termination of an alleged conspiracy, when such declarations, admissions and confessions were made in anticipation of leniency.

6. Whether a trial judge can overrule and ignore a prior decision of another judge of coordinate jurisdiction.

7/ Whether a trial judge can dispute and enter into a controversy as to the contents of an affidavit of bias and prejudice without forthwith disqualifying himself.

8. When a trial judge disputes the contents of an affidavit of bias and prejudice and his denial of an allegation in such affidavit appears in the public press, is he not required to poll the jury as to whether any of the jurors have read such article in the public press.

9. Whether a trial judge is required to declare a mistrial and forthwith disqualify himself when in the trial of a case the bias and hostility of said judge becomes overwhelming.

10. When grand jury process is abused and when as a result of the misconduct of government prosecutors the said grand jury becomes biased, should not the indictment be dismissed.

11. When the process of a grand jury is misused and abused as a result of misconduct of government prosecutors and the said grand jury is being utilized for the sole and dominating purpose of preparing an already pending indictment for trial, does it not require the dismissal of the indictment.

12. Whether an accused or accused persons are denied a fair and impartial trial when the trial judge ignores the rule of completeness.

13. Whether an accused or accused persons are denied a fair and impartial trial when the trial judge after being shown that a police officer who is himself a target of investigation as to an allegation of bribery against said police officer and yet the same police officer is permitted to

(ii)

take over the investigation denies to the accused the right to show the proper role of the police officer in the case.

14. Whether an accused is denied due process of law and a fair and impartial trial when the trial judge refuses to permit evidence showing that the prosecution is not brought in good faith.

15. Whether an accused is denied due process of law and a fair and impartial trial when a trial judge denies the right to show misconduct on the part of government prosecutors in protecting an accused police officer by suggesting and procuring false testimony so that other persons will be unjustly charged.

16. Whether a trial judge does not violage the rule of fundamental fairness when after he has received in evidence recordings obtained in violation of the Federal Communications Act damaging to the accused and denies to the accused the right to have played recordings showing gorss misconduct on the part of the government prosecutors when said recordings would demonstrate that the indictments would not have been brought against the accused if an accusation of bribery had not been brought against a police officer and the recordings would have further shown that the government prosecutors were trying to shield the said police officer and were making no honest effort to determine whether the allegation of bribery was in fact well founded.

17. Whether a trial judge does not deny a fair and impartial trial to accused when he denies tendered instructions clearly setting forth the applicable law.

18. Whether a trial becomes unfair when a trial judge as further evidence of his bias and prejudice permits the playing before a jury during the final argument of government prosecutor tape recordings damaging to the cause of appellants and refuses to have played certain tape recordings showing misconduct on the part of government prosecutors and a certain police officer suspected of bribery and said tape recordings would have shown that the prosecution was not brought in good faith.

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IN THE UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

No. 18, 711

JAMES J. LAUGHLIN,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 18,712

ALLAN U. FORTE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLANTS

JURISDICTIONAL STATEMENT

These causes come to this Court after a verdict of guilty on an indictment charging appellants with a conspiracy and with certain substantive offenses. Judgement was imposed on June 18, 1964 and notices of appeal were filed the same day. This Court granted appellants leave to consolidate these cases for all purposes and the matter is properly before this Court.

STATEMENT OF THE CASE

The appellant James J. Laughlin is an attorney at law. The appellant Allan U. Forte is a physical therapist. Each of the appellants were jointly charged in an indictment alleging conspiracy and influencing witnesses. As a result of a trial both appellants were convicted and hence appeal to this Court from the conviction. In order to adequately and fully present their cases to this Court appellants feel that the following background should be included.

It all began in February of 1963 during a trial involving appellant Allan U. Forte who was charged with abortion in Criminal Case No. 741-61. During the course of said trial before the Honorable Judge Tamm, the appellant Forte testified that one Samuel E. Wallace, a detective on the Metropolitan Police Department and who was the arresting officer in 741-61, had attempted to solicit a bribe from Forte. Forte testified that Detective Wallace promised him that for a payment of \$2,000 he would "fix" the case on trial and for the payment of \$250 a month Forte could operate as an abortionist in the District of Columbia (see Transcript of Proceedings, Criminal Case No. 741-61, February 14, 1963, Pages 173, 174, 192 to 196). Detective Wallace denied the allegations (Transcript 741-61, February 14, 1963, Pages 109-110). Appellant Forte was acquitted of the charge contained in Criminal Case No. 741-61.

It should be stated that during the course of the trial, after the accusations were made by Forte against Wallace, a motion was filed on behalf of Forte that inasmuch as the administration of justice was affected, both Forte and Wallace submit to lie detector tests at the hands of the Federal Bureau of Investigation. Forte agreed to take the test. Wallace refused (Transcript of Proceedings, Criminal Case No. 741-61, February 19, 1963, Pages 1 to 19). Being that Officer Wallace would not consent to take the lie detector test, the Court was without

power to order it. Another motion was filed on behalf of Dr. Forte to require Wallace to take a lie detector test and the same was argued before Judge Youngdahl on September 27, 1963 (Transcript of Proceedings 1 through 10, Criminal Case No. 741-61). At that time Assistant United States Attorney Sullivan made the statement to Judge Youngdahl: "Wallace indicated to the United States Attorney's office his willingness to take the test" (Page 5 of the Transcript of Proceedings, September 27, 1963). Officer Wallace never took the lie detector test.

Be that as it may, a grand jury was empaneled to investigate alleged obstruction of justice in Criminal Case No. 741-61, United States v. Forte, and also to investigate the accusations made by Forte against Wallace (see Transcript of Grand Jury testimony of Allan U. Forte, March 6, 1963; also Page 2, Grand Jury testimony, Bernice Gross, March 1, 1963, first appearance before Grand Jury that day).

Wallace, himself, testified before the Grand Jury (Grand Jury testimony of Wallace, March 1, 1963, Pages 1 and 2). Wallace's interrogation by Assistant United States Attorney Sullivan was very brief on the allegations of the bribery. In essence he was asked whether or not his testimony during the course of the trial in Criminal Case No. 741-61 was correct and whether or not he denied the allegations of Forte that Wallace tried to shake Forte down. It does not appear that the Grand Jurors asked any questions of Wallace nor did Mr. Sullivan go into any of the details of Forte's accusations. Forte's testimony before the Grand Jury on March 6, 1963 was very detailed concerning his allegations against Wallace. For example, street locations of meetings, description of the car and matters as to a change of prosecutors was testified to. Wallace appeared before the Grand Jury again on March 20, 1963 at which time he detailed to some extent his experience on the Metropolitan Police Force and the fact that he had worked on a greater number of abortion cases than other members of the Homicide Squad. He also went into a visit

to Mrs. Gross' home and then proceeded to give a very detailed description of the activities of certain alleged abortionists which had nothing to do with the inquiry at hand but was merely for the purpose of ingratiating himself before the Grand Jury. There does not appear any interrogation of Wallace regarding Forte's alleged bribery accusations. Wallace appeared again before the Grand Jury on March 26, 1963 and testified concerning certain alleged information from appellant Laughlin regarding Jean Smith, the complainant in Criminal Case No. 741-61. Again there appears no interrogation regarding Forte's charge against Wallace.

It is evident from a reading of this Grand Jury testimony that the Grand Jurors themselves became favorably impressed with Wallace as a result of testimony given by Wallace which was totally irrelevant to the matter under investigation.

A new figure of paramount importance emerges on the scene. It is in the person of Bernice Gross, a former Baltimore policewoman who first appeared before the Grand Jury on March 1, 1963 in connection with the instant case. During that first appearance Assistant United States Attorney Sullivan outlined to Mrs. Gross the allegations that Forte had made against Wallace and then questioned her concerning her participation in the abortion charge contained in Criminal Case No. 741-61. She was asked whether or not Wallace or anyone in his behalf attempted to arrange to "fix" the case (Criminal Case No. 741-61) and whether or not she had any knowledge of an attempt by Wallace to "shakedown" Forte. In fact a good deal of her interrogation by Mr. Sullivan on this first appearance concerned any knowledge which she may have had concerning the activities of Wallace. Then she was asked whether or not she was contacted by an attorney representing himself to be Forte's lawyer and offered any money or anything of value in return for any service that she might perform in connection with the alleged abortion charge in 741-61. At this time she denied any knowledge concerning the alleged accusation by Forte against Wallace and denied any approach by anyone acting in Forte's behalf

concerning the alleged abortion in 741-61. After she had completed her morning testimony she was brought by Mr. Sullivan to the office of Joseph M. Hannon, another Assistant United States Attorney, and was interrogated by Mr. Sullivan and Mr. Hannon for some two or three hours. The tenor of this interrogation was not directed toward the allegations of Forte against Wallace but was directed toward any connection which Mrs. Gross may have had with the appellant Laughlin. Mrs. Gross then re-appeared before the Grand Jury the afternoon of the same day and altered her testimony regarding contacts alleged to have been made to her by appellants Forte and Laughlin. It was during this session that a proposition was made to her to make telephone calls to appellants Forte and Laughlin and "chat with them on the phone". Mrs. Gross was reluctant to do this but upon being confronted with the implication that she, herself, could be indicted for perjury and in the hope of receiving leniency stated she would make the calls. Mrs. Gross further appeared before the Grand Jury on March 18, 1963 and gave rather extensive testimony. It is apparent that the course of the Grand Jury investigation shifted very decisively from the allegations by Forte against Wallace to the implication of an alleged attempt to influence the complaining witness in Criminal Case No. 741-61 by appellants Forte and Laughlin. In this respect Wallace fades from the immediate picture and in fact when the indictment against the appellants herein was returned in July of 1963, Wallace is not mentioned at all. Mrs. Gross becomes more and more the central figure in this case and the main testimony against the appellants herein was by this witness who had committed many acts of perjury. It is further significant to note that in the telephone calls placed from Mr. Acheson's office on March 1, 1963 which were recorded by Mr. Sullivan with the assistance of Wallace and others, at no time did Mrs. Gross identify herself by name and it was only after appellant Laughlin's appearance before the Grand Jury on March 6, 1963 that

Mrs. Gross identified herself by name in another recorded telephone conversation from Mr. Acheson's office.

When the trial began in April 1964 in the instant case we find the figure of Wallace almost totally faded from the picture and the figure of Mrs. Gross as the star witness for the prosecution. The record will reflect that she was a person who had nothing to lose and everything to gain from her testimony as a Government witness. The Assistant United States Attorney who conducted the Grand Jury investigation, Mr. Harold J. Sullivan, had dutifully recorded many telephone conversations between himself and Mrs. Gross and these were played out of the presence of the jury. These conversations clearly reflect the manner in which Mrs. Gross ingratiated herself with Mr. Sullivan even to the point of calling him by his first name.

The witness Jean Smith, also testified during the trial and admitted that all of her contacts were with Mrs. Gross concerning the phrasing of letters and the receiving of money. In no instance was Mrs. Gross' testimony corroborated by any substantial independent legally admissible evidence.

When the trial got under way the testimony of Jean Smith, the complaining witness in Criminal No. 741-61, was received. She testified that she had never talked with appellant Laughlin, that no money passed, and no phone calls were made. She further said that she testified fully in the courtroom of Judge Tamm and had identified appellant Forte and that she held back nothing. She said that she had discussed money with the witness Bernice Gross and that Gross had first mentioned money to her in February 1963 (Transcript 78, 79). She testified that she was not told to lie on the stand (Transcript 102). She testified that she was given a recording device by Officer Wallace to record any conversation she had with the witness Gross (Transcript 82, 83). The substance of her testimony was to the effect that Gross suggested that she write certain letters to the office of the

United States Attorney that she did not desire to testify in Criminal No. 741-61. She testified that she received certain money from the witness Gross and that she had no hesitancy in receiving it (Transcript 111). She further testified that in the summer of 1961 she had told Officer Wallace that she did not care to testify in the case (Transcript 122, April 17, 1964, Reporter Davis).

The witness Bernice Gross being the main witness for the prosecution (named a co-conspirator but not a defendant in the instant cause) testified as to certain alleged transactions with appellant Forte and conversations with appellant Laughlin. It should be noted, however, that as stated above, Gross' testimony was not corroborated by any legally competent evidence and that she had admitted to committing many acts of perjury before the Grand Jury.

The Government played in the presence of the jury certain recordings of telephone conversations allegedly between Gross and appellant Laughlin. This was done over strenuous objection by appellants, it being argued that the matter of these recordings and their legality had been determined by Judge Youngdahl in his opinion reported at 222 F.Supp. 264, and also judicially determined by Judge Curran in his opinions reported at 223 F.Supp. 623, and 226 F.Supp. 112, United States v. Laughlin. It should be pointed out in this connection that the Government appealed from Judge Curran's ruling and later abandoned the appeal. The trial judge, however, allowed the recorded telephone conversations to be played before the jury in spite of the rulings of two judges of coordinate jurisdiction.

It was brought out during the course of the trial there were perhaps 100 telephone conversations between Gross and Sullivan and Gross and Wallace in 1963. Many of those telephone conversations were recorded and taped. The evidence showed that Officer Wallace arranged to place the necessary recording apparatus

in Mrs. Gross' home in Baltimore. The evidence also showed that on occasions Officer Wallace arranged to send a police vehicle to Baltimore to bring her to Washington.

In addition to the above, the same Gross was brought before another grand jury on March 19, 1964 -- over a year later (See transcript of Grand Jury testimony, Gross, March 19, 1964 - 63 pages). It is interesting to note that her last statement to the Grand Jury March 19, 1964 was:

"I didn't know Dr. Forte from a hole in the wall. I wasn't doing him a favor because I liked him. I didn't even know him. And I felt that eventually that he would give me something for it, which I never got. But that's life."

Her earlier testimony was to the effect that she knew Forte in 1961 and participated in his arrest in the summer of 1961 and she further testified that she had received money from him and had retained a sum between \$100 and \$200. It is also well to point out that she testified before Judge Youngdahl in October 1963 in Criminal No. 599-63 (see Pages 27 to 68, Transcript of Proceedings in Judge Youngdahl's court October 4, 1963 and October 7, 1963).

One Dorothy Birge testified as to alleged contacts with appellant Forte. (Transcript of Proceedings 132 to 150, April 17, 1964). Although this witness made certain statements against appellant Forte, the Government later abandoned this count in the indictment and the trial judge at no time told the jury to disregard her testimony.

The Government placed into evidence certain telephone records over the objection of appellants, in view of the prior ruling of Judge Curran in Criminal No. 599-63, United States v. Laughlin.

After the Government rested, both appellants moved for a judgment of acquittal and same was denied. Motions were made to strike certain testimony and same was denied. A motion for severance on behalf of appellant Forte was again made and denied.

When the Assistant United States Attorney was making his summation to the jury it was noticed that certain apparatus had been set up in the courtroom to play certain recordings. At transcript 1040, April 28, this occurred:

"MR. LAUGHLIN: If there's any attempt at this time to play those recordings, objection is made.

THE COURT: He will be allowed to play them during the argument if he wishes.

MR. LAUGHLIN: And will he play those that were refused to us also, recordings of Gross and Wallace and --

THE COURT: Only recordings which are in evidence will be played, Mr. Laughlin."

And at 1048 of the transcript, April 28, this occurred:

"MR. LOWTHER: Think you now that this Defendant Laughlin --

MR. LAUGHLIN: Your Honor, may we come to the bench?

THE COURT: Yes, you may come to the bench, Mr. Laughlin.

MR. LAUGHLIN: Well, Your Honor shouldn't answer in that tone. I want the record to show that we --

AT THE BENCH:

MR. LAUGHLIN: Move for a mistrial, Your Honor. There was no basis, could I inquire whether Your Honor knew they were going to do this?

THE COURT: No, I didn't know they were going to do it, Mr. Laughlin, but these are in evidence. * * *

* * *

MR. LAUGHLIN: I submit this is a proper time to -- I think this is a basis for mistrial. I think this emphasizes what we contend, what I contend on the behalf of Forte from the beginning, that you have had a distinct bias and prejudice against me, that you lost no opportunity to manifest that, and that you have gone to every extreme to protect the Police Department, protect Wallace, prevent the real issues from coming out. Your manners and your gestures, your inclinations (sic) (should be intonations) have been certainly prejudicial to us. At no time did you ever try to elicit any testimony that would be favorable

to us and, even with that, you saw fit, in the presence of the jury, to rebuke Mr. Garber, and I (sic) (meaning me), for conferences at the table which we had a right to do.

And I think all of that adds up, and I want that on the record.

THE COURT: I think the record will speak for itself, Mr. Laughlin.

* * *

MR. GARBER: * * * I would move for a mistrial on the basis of the playing of those recordings, (Number 1), on the basis of the objection to the recordings initially made and in view of the rulings of Judge Youngdahl and Judge Curran on these very recordings. I submit that for all of the reasons that I have argued previously to these recordings and my objection to them, I renew them at this time and move for the mistrial now in view of the fact that they have been played in the presence of the jury.

* * * this procedure is the same as -- almost the same as recalling a witness back to the stand to give testimony during the summation. It seems to me that if it would have been proper to allude to what exactly was said on these recordings, that there was a stenographic transcript available at the time that they were played in evidence, and that was the proper manner to refer to them and not to replay them during the course of summation; and on that basis, and on the previous ground, I move for a mistrial on behalf of Defendant Laughlin.

THE COURT: Both motions for mistrial are denied. (Transcript 1050)

It will be seen that the trial judge had permitted appellants to ask the following questions of the witness Jean Smith: (Transcript of Proceedings, 75-76, April 16, 1964, Reporter Henderson):

"BY MR. LAUGHLIN:

Q * * * Now there was, was there not, a time or times that you talked to Mrs. Gross or she talked to you about Sergeant Wallace* * *?

A Oh, yes, she made quite a few remarks.

Q Did she ever tell you that Wallace was paid off?

A Yes.

Q * * * on how many occasions?

A Quite a few.

Q * * * and paid off in Baltimore or here or where?

A She didn't say."

The above was in the record and before the jury. During final argument at transcript 1096, when counsel desires to read this to the jury this occurred:

"THE COURT: * * * The question of Sgt. Wallace is not before the jury. It is not a matter in which this jury is trying and I will not permit that part to be read.

MR. LAUGHLIN: * * * it has not been stricken, it's a part of evidence in this case.

THE COURT: All right, I still won't permit it to be read."

In final argument of the Assistant United States Attorney there was demonstrated such a lack of fundamental fairness that the record speaks for itself.

STATUTES INVOLVED

Title 18 Section 371, United States Code, provides:

"If two or more persons conspire either to commit any offense against the United States....and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.."

Title 18 Section 1503, United States Code, provides:

"Whoever corruptly, or by threats or force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any witness in any cour of the United States....or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice....."

Title 47 Section 605, United States Code, provides:

"No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents....to any person....."

Title 47 Section 501, United States Code, provides:

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter or thing in this chapter prohibited or declared to be unlawful.....shall be punished....."

Title 28 Section 144, United States Code, provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein...."

STATEMENT OF POINTS

1. The reception in evidence of the telephone recordings violated not only existing law but appellants' constitutional rights.
2. The lower court misapplied and misconstrued the law of conspiracy and post-conspiracy declarations.
3. The integrity of the courts is impaired and efficiency diluted when a judge of equal rank can ignore, disregard and overrule a decision of another judge in the same court.
4. When an affidavit of bias and prejudice, legally sufficient, is filed, the trial judge cannot go into the truth or falsity of the said affidavit.
5. When in the course of a trial the bias, prejudice and hostility of the trial judge becomes overwhelming he should forthwith disqualify himself and declare a mistrial.
6. When as a result of misconduct the Grand Jury becomes a pawn in the hands of Government prosecutors and thereby becomes biased, the indictment should be dismissed.
7. When it is shown that a Grand Jury is being used for discovery proceedings in order to permit the Government prosecutors to prepare for trial on an indictment presented by a previous Grand Jury, the indictment in the present cause should be dismissed.
8. The trial judge wrongfully excluded evidence showing misconduct on the part of the United States Attorney's office and on the part of Officer Wallace in refusing to permit the playing of recordings reflecting conversations between Sullivan and Gross, and Gross and Wallace.
9. The trial court disregarded the rule of completeness.

10. The court erred in denying appellants' tendered instructions.

11. The trial court was in error in its charge to the jury on the law regarding conspiracy and post-conspiracy declarations.

ARGUMENT

- I. The reception in evidence of the telephone recordings violated not only existing law but appellants' constitutional rights.

There was placed before the jury certain recordings. These recordings reflected telephone conversations between the main witness and co-conspirator in the indictment, Bernice Gross, with appellant James J. Laughlin. The calls originated in the office of the United States Attorney David C. Acheson. The telephone calls were inspired by Assistant United States Attorney Harold J. Sullivan. At the time the telephone calls were made there were present in Mr. Acheson's office Bernice Gross, Mr. Sullivan and a detective, Samuel E. Wallace, who was himself a target of investigation.

We have already set out in the Statement of the Case that the Grand Jury was impaneled as a result of an accusation made by the appellant Forte in the courtroom of Judge Tamm. At that time (Criminal No. 741-61, United v. Forte). the appellant Forte was on trial for allegedly performing an abortion on one Jean Smith. The main arresting officer in that case was Detective Samuel E. Wallace. Appellant Forte testified that Officer Wallace had solicited a bribe from him. The bribe was twofold: (a) that if Forte would pay Wallace the sum of \$250 a month he could operate as an abortionist, and (b) if he would pay the sum of \$2,000, Wallace would see that the case would be dropped. This was testimony under oath. Wallace took the stand and denied the accusations. Appellant James J. Laughlin, as counsel for appellant Forte, filed a motion to require both appellant Forte and Wallace to submit to lie detector tests. There was a full hearing outside the presence of the jury. Appellant Forte agreed to take the test. Wallace refused to take the test and has refused at all times to take the lie detector test as to this accusation.

Appellant Forte was acquitted. After his acquittal a Grand Jury was impaneled to investigate two matters: (1) the alleged bribery of Wallace, and (2) whether any attempts had been made to influence the testimony of Jean Smith. We have set forth in the Statement of the Case that although Wallace was under investigation he was virtually permitted to take over the inquiry, to interview witnesses and to suggest that certain witnesses take lie detector tests.

Bernice Gross was brought to the District of Columbia and her Grand Jury testimony is a part of the record in this case. She denied that she had any contact with the appellants. After her testimony was completed before the Grand Jury, she was told to remain. She was then taken to the office of Joseph M. Hannon, Assistant United States Attorney, and interrogated for some three or four hours. A transcript of this interrogation is a part of the record in this case. As a result of the "brainwashing" in the office of Mr. Hannon and the harassment, coercion and undue influence exercised upon her by Mr. Hannon and Mr. Sullivan, she outlined a version of certain events which satisfied Mr. Hannon and Mr. Sullivan. She was then taken back before the Grand Jury and at that time she made oath to the fact that everything that took place in the office of Mr. Hannon was true. It will be seen that she admitted many, many acts of perjury and this is not disputed or denied. In her second appearance before the Grand Jury on March 1, 1963, she was not only coerced by Mr. Sullivan but she was threatened and badgered by the Deputy Foreman of the Grand Jury.

The Consent Was Not
A Voluntary One

The opinion in Weiss v. United States, 308 U.S. 321, is controlling. The opinion in that case referred to the matter of possible leniency and that

loomed large in the Supreme Court's opinion. Judge Youngdahl went into the matter so thoroughly that we believe that it will be helpful if we quote generously from his comments as found in the Transcript of Proceedings of October 8, 1963, Criminal Case No. 599-63, United States v. Laughlin, made a part of the record in this cause. Judge Youngdahl was justifiably incensed at the tactics pursued by Mr. Sullivan in the Grand Jury room and by the Deputy Foreman, particularly as to the statements made including the terms "big fish" and the "little fish", and it was abundantly clear that the consent of Mrs. Gross was not a voluntary one but was induced because of the situation confronting her. For instance at Page 308 in the proceedings of October 8, Judge Youngdahl made this statement to the United States Attorney:

"THE COURT: Regardless of all the cases that you can cite you have not, as yet, cited any case to me so far where we have a similar state of facts showing that leniency or statements of this character have been made by a Deputy Foreman of the Grand Jury, and an Assistant United States Attorney, indicating clearly, it seems to me, that some type of leniency would be given, if not in effect she would not be indicted for perjury, at least some type of leniency would be shown to her if she cooperated, because they were after the big fish and if we don't get the big fish, we are going to get the little ones, and, obviously, by the little ones it was meant Mrs. Gross. That was no question about that, that is what the Deputy Foreman of the Grand Jury was referring to.

So, there was certainly a clear-cut statement on the part of the Deputy Foreman of the Grand Jury, and I didn't have the benefit of this during the two-day period of examination here when we were going over these tapes.

If I would have had the benefit of this at that time I would have come to the same conclusion I have come to now and it is very unfortunate that I didn't have the benefit of that testimony at that time."

When the Assistant United States Attorney attempted to point out that the Grand Jury was an inquisitorial body and that they were given a considerable amount of latitude, Judge Youngdahl replied (Page 317):

"THE COURT: * * *. I have been involved with Grand Juries

for over three and a half decades. You can bring in hearsay testimony, they can start out on one tack and go entirely on another tack. * * * But what we are concerned here with is the violation of a Federal Statute which requires consent of the sender to telephone communications with this type of apparatus being used, that is what we are concerned with, and with whether or not, as you concede, there must be consent of the sender before this type of apparatus can be legally used. That is the single question we are concerned with.

This does not go to the latitude, does not restrict the latitude of the Grand Jury's investigation regardless of how wide a latitude the Grand Jury has, it has no right to make promises of immunity or leniency without being subject to the objection of lack of consent to the use of this type of apparatus.

This is the point I am making because of the wording of the statute, which says that there must be consent."

And then referring again to the matter of the "big fish" and the "little fish", Judge Youngdahl said (Page 320):

"From reading these statements it seems clear to the Court that she was influenced by these statements and having been influenced then it takes away from this consent the voluntariness that must be in the consent to call it consent at all."

In this connection, if we may digress for a moment, we would like to say to the Court that there is made a part of the record in this case the entire transcript of proceedings before Judge Youngdahl as well as the file in that cause (Criminal No. 599-63, United States v. James J. Laughlin). As to what took place in her second appearance before the Grand Jury, Judge Youngdahl made the following statement (Page 310, Transcript of Proceedings before Judge Youngdahl, Oct. 8, 1963, Criminal No. 599-63):

"I was shocked when I read the testimony for the first time of the Deputy Foreman of the Grand Jury and of Mr. Sullivan."

Continuing, Judge Youngdahl said:

"Entirely aside from the statement of Mrs. Gross, which, as I say, standing by itself would not be sufficient in my opinion because it is objective, but fortified by these two statements which shocked me, as I read them for the first time, * * *."

Our view is that the trial judge in the instant case was bound by the opinion of Judge Youngdahl. In the proceedings before Judge Youngdahl, Criminal Case No. 599-63, testimony was taken and he wrote a very complete and exhaustive opinion holding that Weiss v. United States, 308 U.S. 321, 330 was violated. See 222 F. Supp. 264, United States v. Laughlin. In Judge Youngdahl's opinion, referred to above, we find at Page 313, Criminal Case No. 599-63):

"For example, by Mr. Sullivan: Just before the Grand Jury then one final thing. You did say, didn't you, Mrs. Gross, that since you have come forward and told the truth now you would also be agreeable to have someone listen in on your extension phone tonight should Forte call you.

:Answer. The only trouble with that is my husband doesn't know anything about this and if someone would have to tell him I --

"Question. I think in fairness I should advise you if this Grand Jury matter results in an indictment of anyone, it is going to be public information, anyway. The possibility of your husband learning is extremely great. You can think that over yourself as a practical person.

"Answer. I would still not like it in my house, I wouldn't.

"Question. You see, we have no legal way of doing it except in your house.

"Answer. Well, I was not going to answer the phone this evening because I don't want to have any more conversations and I was going to New York today -- that's my home -- but I couldn't because I had to come here, and I know I am going tomorrow. I am not answering the phone tonight and if he knows I am here he is just liable not to call.

"Question. I have no way at all of forcing the answer from you. It has to be your personal choice.

"Answer. I don't.

"Question. Do you have any objection of making a telephone call to Mr. Forte before leaving Washington and chat with him on the phone, as well as one with James Laughlin and chat with him on the phone?

"Answer. I would rather not.

"Question. I understand that you would rather not, but your cooperation - -

"Answer. If I had to, I would, but if I don't have to I would rather not.

"Question. On the record let me put this to you, all we want is the truth, you don't have to make those telephone calls.

"Answer. I have told you the truth.

* * *."

And at Page 315, Transcript of Proceedings, Oct. 8, 1963, Criminal No. 599-63, United States v. Laughlin, Judge Youngdahl continued reading from the Grand Jury transcript as follows:

"Question. Fine, but the thing we talked about on the record down in Mr. Hannon's office, I'll say it right before the Grand Jury. I said to Mrs. Gross that the big fish behind an operation like this are the ones who are most guilty. The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between, that is the only way we make the case on the big people. We need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation. (Emphasis supplied)

"Now, what does that mean? What does that mean? I will read it again:

"We need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation."

Continuing, Judge Youngdahl said:

"Now, I take it to mean, in plain English, that if you cooperate, Mrs. Gross, there is a great chance if not a complete chance that you will not be indicted for perjury despite the fact that you admitted that you lied before the Grand Jury.

"Is that an unreasonable assumption of that interpretation?"

At Page 316 Judge Youngdahl then said:

"THE COURT: You would not have to make the telephone call; you see my point. Now, what is the purpose of those four words,

you see my point? You would not have to make the telephone call. You see my point? After he had just stated, you need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning, would be largely determined by the measure of your cooperation. You see my point?

"And the answer was: I know your point very well. I understand your point very well."

And then Judge Youngdahl at Page 316 referred to the remarks of the Deputy Foreman of the Grand Jury:

"Then the Deputy Foreman: Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get the cooperation and can't get those we'll get the ones we can."

"That, obviously, means that they are not going after the little ones if they can get the big ones. I can't place any other interpretation on that."

Then Judge Youngdahl referred to the additional language of the Grand Jury Deputy Foreman (Page 317, Proceedings before Judge Youngdahl, Oct. 8, 1963):

"I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big ones, but if they make it impossible for us to get the big ones we'll get the little ones."

Commenting on the above statement of the Deputy Foreman, Judge Youngdahl said this:

"Now, I don't understand the English language if that doesn't mean, if you cooperate and help us get the big ones we will leave you alone."

And in commenting further on the statement of the Deputy Foreman coinciding generally with the statement of Mr. Sullivan: "If we don't get the big fish we will get the little ones", Judge Youngdahl said (Page 320, Proceedings before Judge Youngdahl, Oct. 8, 1963):

"That it goes right to the very heart and kernel of the issue that we are discussing as to whether or not a promise of leniency was made to Gross by either Mr. Sullivan or the Deputy

Grand Jury Foreman, and on the basis of that promise she consented. And if Mrs. Gross had known, for example, that she would still be indicted before the Grand Jury, absent these two statements, by reason of these two statements not being made, then she would have refused to go ahead with it, it would indicate the effect of these statements.

"From reading these statements it seems clear to the Court that she was influenced by these statements and having been influenced then it takes away from this consent the voluntariness that must be in the consent to call it consent at all."

It is significant in this case that the Assistant United States Attorney, Mr. Lowther, deliberately and willfully concealed from Judge Youngdahl the true facts and circumstances with regard to the telephone recordings. This is clear from a reading of the transcript of proceedings at Page 324 on October 8, 1963 in Criminal Case No. 599-63, when Judge Youngdahl said this:

"I have studied it carefully and read it over many, many times (Grand Jury minutes) and as I said if I had the benefit of this testimony at the very outset during the two days when the Court was listening to these tape recordings, if I had the benefit of this, the argument involved in it at the time, I wouldn't have gone on with the testimony with the conclusion I have now reached after studying the cases which I didn't have the opportunity to study at that time because no brief had been submitted to me, no trial brief, and I did not have any idea what question was coming up in connection with this or what type of machine was going to be introduced for the first time when it came here in the courtroom. It was brought to my attention for the first time. I had no idea what type of machine was going to be used or what issues were going to be involved, you see, so I was confronted with the necessity of reading these voluminous Grand Jury minutes besides taking care of numerous motions submitted by the defendant * * *."

In connection with the above, it is well to point out that there is a duty on the part of a prosecuting official to make known to the Court all hidden facts and circumstances in connection with the testimony of any witness. An honest and upright prosecuting attorney will never deceive or withhold information from a Court.

Judge Youngdahl, after carefully reviewing the situation, declared a mistrial in the case and his opinion is reported at 222 F.Supp. 264, United

States v. Laughlin, and sets forth:

"At the time I permitted the recordings to be read before the jury I did not have the benefit of the Grand Jury testimony, the statement of the Deputy Foreman of the Grand Jury and the statement of Mr. Sullivan, the Assistant United States Attorney, when Mrs. Gross was in the Grand Jury room testifying after she had concededly admitted perjury, I did not have the benefit of that during the several days I was considering whether these tape recordings should be read to the jury."

Continuing, Judge Youngdahl said (Page 332, Proceedings before Judge Youngdahl, Oct. 8, 1963, Criminal No. 599-63, United States v. Laughlin):

After they were read to the jury for the first time the Grand Jury testimony was presented to me so that I had the benefit of this and had the benefit of further research into the law in the matter and after carefully studying this Grand Jury testimony and researching the law I have come to the conclusion, as I say, for the reasons I will now read as stated in this memorandum."

In the opinion of Judge Youngdahl it recites this:

"* * * the relevant evidence showed that the recordings were made in the office of the United States Attorney * * *. They were made by means of an induction coil which was placed under an extension telephone while Mrs. Gross called the defendant on another telephone in the same room. Both telephones were part of the regular office equipment, not installed specially for the purpose of these calls. The induction coil led to a tape recorder on which the conversations were recorded while they were being made.

"On the basis of this evidence, the Court ruled that, assuming voluntary authorization on the part of Mrs. Gross, the tapes would be admissible. The Court so ruled despite the fact that neither the Supreme Court nor the Court of Appeals for this Circuit has squarely passed upon the admissibility of such evidence. Without presuming to predict how those Courts would decide this issue were it to arise, this Court concluded that certain cases in those Courts admitted evidence under somewhat similar circumstances * * *?"

And the opinion further set forth:

"As to the first point -- Mrs. Gross' voluntary authorization to have the recordings made -- the only testimony was that of Harold J. Sullivan, an Assistant United States Attorney who had tried United States vs. Allan U. Forte, *Supra*, who had interrogated Mrs. Gross, * * *, and who supervised the making of the recordings. Mr. Sullivan testified that Mrs. Gross was agreeable to having the conversations taped. The Government did not put Mrs. Gross on the stand

to establish the voluntariness of such authorization, * * * the Court concluded that the authorization had been voluntarily given * * *."

The opinion set forth that after Mrs. Gross testified on the stand she was questioned on cross examination as to the voluntariness of her consent and she replied: "I felt I had to cooperate." The opinion set forth that in that state of the record the Court excused the jury and questioned Mrs. Gross on the issue of voluntariness. The opinion sets forth, too, that Mrs. Gross had been brought before the Grand Jury on the morning of March 1, 1963 at which time she denied having known the defendant Laughlin, appellant herein, or having talked with him. Later she was taken to the office of Joseph M. Hannon, Assistant United States Attorney, and interrogated by Mr. Hannon and Mr. Sullivan. During the course of this interrogation she was shown certain incriminating evidence, and finally admitted she had perjured herself before the Grand Jury. She then made additional statements, which were taken down by a stenographer, and re-appeared before the Grand Jury the same afternoon. The opinion set forth that at the time the Court ruled that the consent was a voluntary one, the Court had not read the exchange between Mrs. Gross, Assistant United States Attorney Sullivan and the Deputy Foreman. The opinion then set forth the following (Pages 339, 340, 341 and 342, Transcript of Proceedings, October 8, 1963, before Judge Youngdahl):

"After reading this entire transcript (Grand Jury proceedings up to and including the appearance of appellant Laughlin on March 6, 1963), the Court concluded that the questions and answers were material to the subjects under investigation.

'By Mr. Sullivan:

'Question. Just before the Grand Jury then one final thing. You did say, didn't you, Mrs. Gross, that since you have come forward and told the truth now you would also be agreeable to having someone listen in on your extension phone tonight should Forte call you?

'Answer. The only trouble with that is my husband doesn't know anything about this, and if somebody would have to tell him I --

'Question. -- I think in fairness I should advise you if this Grand Jury matter results in an indictment of anyone it is going to be public information anyway. The possibility of your husband learning is extremely great. You can think that over yourself as a practical person.

'Answer. I still would not like it in my house, I wouldn't.

'Question. You see, we have no legal way of doing it except in your house.

'Answer. Well, I was not going to answer the phone this evening because I don't want to have any more conversations and I was going to New York today -- that's my home -- but I couldn't because I had to come here, and I know I am going tomorrows. I am not answering the phone tonight and if he knows I am here he is just liable not to call.

'Question. I have no way at all of forcing the answer from you. It has to be your personal choice.

'Answer. I don't.

'Question. Do you have any objection of making a telephone call to Mr. Forte before leaving Washington and chat with him on the phone, as well as one with Majes Laughlin and chat with him on the phone?

'Answer. I would rather not.

'Question. I understand that you would rather not, but your cooperation --

'Answer. If I had to I would but if I don't have to I would rather not.

'Question. On the record let me put this to you, all we want is the truth, you don't have to make those telephone calls.

'Answer. I have told the truth.

'Question. Fine, but the thing we talked about on the record down in Mr. Hannon's office I'll say it right before the Grand Jury. I said to Mrs. Gross that the big fish behind an operation like this are the ones who are most

guilty. The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between, that is the only way to make the case on the big people. We need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation. You would not have to make the telephone call. You see my point?

'Answer. I know your point very well. I understand your point very well.

'Question. Mrs. Gross, you are an experienced police-woman?

'Answer. I am, very.

'Question. You know the point?

'Answer. I realize your point but I say I would rather not. If I did not have to I would rather not. If I had to I would. There is nothing I can do.

'Deputy Foreman. Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we will get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

'Mr. Sullivan. Thank you, Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

'Answer. Okay.

'Mr. Sullivan. Thank you very much for your cooperation in telling the truth today."

Continuing, Judge Youngdahl in his opinion said this: (Pages 343, 344):

"In the light of this testimony before the Grand Jury and in of Mrs. Gross' statement that she felt she 'had to cooperate' in making the telephone calls and permitting them to be recorded, the Court questioned Mrs. Gross as follows:

'The Court. Now, Mrs. Gross, you heard the answer

repeated by Mr. Kaufman, the reporter, that in answer to Mr. Laughlin's question you felt you had to cooperate in permitting these telephone calls to be made. What did you mean by that?

'The Witness. Well, it wasn't a question of whether I wanted to, any more. It was what I had to do -- within myself. I mean there was no threat of any kind made to me; if that is what it implied I am sorry.

'The Court. I still don't understand what you meant when you said that you thought you had to.

'The Witness. Well, I knew I should at that point, that I -- I had to. I had to cooperate --

'The Court. Why did you have to? Couldn't you have refused to do something?

'The Witness. I don't know. I guess I could have refused.

'The Court. Then what did you mean when you said that you had to?

'The Witness. I thought it would be best for me.

'The Court. Best for you with reference to what possible action the Grand Jury might take in your case?

'The Witness. Yes, sir."

Therefore, Judge Youngdahl ruled that the consent was not a voluntary one and that the case of Weiss v. United States, 308 U.S. 321, 330, was dispositive of the issue.

As to the matter of consent, we will refer a little more to the record. When the witness Gross was testifying before the jury we find the following (Page 690, Transcript of Proceedings, April 23, 1964):

"BY MR. LAUGHLIN:

Q Now at that time, Mrs. Gross, you were nervous and upset, weren't you?

A Very much so.

Q And you were afraid of being indicted for perjury?

A Yes, I was.

Q And you did not want to be indicted for perjury, did you?

A No, sir.

Q And then you were hoping that arrangements could be made where you would not be indicted for perjury; is that right?

A What sort of arrangements are you talking about?

Q In other words, you were expecting to cooperate and therefore escape an indictment for perjury; isn't that right?

A I was looking out for myself at that time; yes, sir.

Q And you felt you had to cooperate with Mr. Sullivan and Mr. Hannon; is that right?

A Yes, sir.

Q And therefore on that account of course you were expecting some measure of leniency; weren't you?

A I was hoping."

And then at Page 750 of the proceedings on April 23, 1964, Mrs. Gross was questioned by Mr. Garber, counsel for appellant Laughlin, as follows:

"BY MR. GARBER:

Q Now, Mrs. Gross, I believe you testified that back in March of 1963 when these telephone conversations were made to Mr. Laughlin's office and recorded, I believe you testified that you felt you were in danger; is that correct?

A Yes.

Q Do you feel you are in danger today?

A Yes, I do."

And continuing, at Page 752 of the Transcript we find the following:

"BY MR. GARBER:

Q And during the time that you were having these various telephone conversations with Mr. Sullivan you felt that you were in danger?

A That's a hard question to answer, Mr. Garber. I felt I had done something wrong; yes, sir, and I don't know what could happen to me.

I still don't.

Q And did you feel that Mr. Sullivan in some way had the power of the opportunity to protect you?

A I felt he had a little power; yes, sir.

Q And you felt that it was to your advantage to cooperate with him as much as possible for your own good, is that not correct?

A Well, with the government, not with him in particular.

Q And you became on a first name basis with Mr. Sullivan, did you not.

A At times, it depended. Sometimes I called him Mr. Sullivan and sometimes Harold."

Of course, it clearly shows from the above that the consent was not a voluntary one and even if the trial judge could overrule Judge Youngdahl and Judge Curran -- which we say he cannot -- there still was lacking the voluntary consent as required by the Federal Communications Act and as set forth in Weiss v. United States, 308 U.S. 321.

Recordings Were In
Violation Of Existing Departmental
Regulations

Insofar as the recordings are concerned it has already been judicially determined that they were obtained in violation of the Federal Communications Act. However, the practice pursued in recording telephone conversations in this case violated also the directives of existing Government departmental regulations. It violated the directive of the Department of Justice dated January 15, 1958 (see memorandum Rufus D. McLean, Acting Assistant Attorney General). In this regard, we desire to call the Court's attention to the letter dated July 14, 1961 signed by Robert Kennedy, Attorney General of the United States, addressed to Honorable John E. Moss, Chairman, Special Government Information Subcommittee, House of Representatives (House Report 1215, Union Calendar No. 525

87th Congress, 1st Session) in answer to questions concerning the use of third party interception of telephone conversations -- so-called wiretapping when the third party usually is a Government official charged with law enforcement -- and in particular the problem of telephone monitoring. The letter of the Attorney General reads in part as follows:

"1. There is no rule in the Department permitting or prohibiting the monitoring of telephone calls. Generally, they are not monitored. Once in a while a person will ask his secretary to get on the phone to take down certain specific data.

"2. We have no electronic devices to monitor incoming telephone calls."

It is also interesting to see in this same House Report 1215 a letter from the then Secretary of Labor, Arthur J. Goldberg (now Justice Goldberg of the Supreme Court), and his letter, dated June 30, 1961, reads in part as follows:

"1. The Department's regulations permit the monitoring of telephone calls only if all parties are notified that a transcription or recording is being made. (Underlining ours)

"2. The Department does not have any electronic devices for recording telephone calls."

We also refer to the letter dated December 12, 1961 signed by Byron R. White, then Deputy Attorney General of the Department of Justice (now Justice White of the Supreme Court), which appears in House Report 1898, Union Calendar No. 790, 87th Congress, 2d Session, and the last paragraph of the letter addressed to Congressman Moss reads in part as follows:

"This is in further reply to your letter of October 23 on telephone monitoring practices.

"There are three switchboards serving the local needs of the Department of Justice, * * *.

"The Federal Bureau of Investigation advises that it does not utilize the devices referred to in your letter. * * *

"The Department of Justice does not use recorders wired into telephone circuits or induction-type attachments or types of instruments that could be used to monitor or record telephone conversations.

"The Department does not contemplate any changes in its present policy."

Use Of The Recordings In
Evidence Required A Severance

The recordings of course were very prejudicial to appellant Forte and even if otherwise admissible, justified a severance insofar as the appellant Forte was concerned.

The contents of the recordings in question are found at pages 98 to 113 of the transcript of proceedings (April 15, 1964). At this time the tapes were played outside the hearing of the jury and were later played before the jury.

While the recordings revealed nothing of a criminal nature, the prosecuting attorneys made much of the contents and insisted on playing same before the jury. It will be seen at a later stage of the brief the Assistant United States Attorney exceeded all bounds of decency in having the recordings played during his final argument to the jury. We have already stated that after all objections were overruled we requested the trial judge to read the contents from the stenographic transcript. At page 218 of the transcript (April 20, 1964) this occurred:

"MR. LAUGHLIN: If Your Honor is going to admit the tapes, of course, I think we have previously stated our objections and the reasons for it -- * * * to eliminate the necessity of setting up this apparatus, I think the contents of the tapes should be read from the stenographic transcript.

MR. LOWTHER: No. * * * I object to that. I think the tapes should be heard.

MR. LAUGHLIN: If there are transcripts of the proceedings * * * which there are, the transcripts should themselves be read.

THE COURT: Well, Mr. Laughlin, I don't know what your defense is, and you have a right -- you have rightly said that I cannot require you to state it, but I do not know but what you all may deny that those --

MR. LAUGHLIN: I didn't understand your last --

THE COURT: That you may deny that those tapes were actually a conversation with you. Now, the voice on the tape would then become a very important part of the matter as to whether the jury believes it or not.

MR. LAUGHLIN: But only at the time, if I made such a statement on the stand.

THE COURT: No; I will permit the tapes to be played."

This, of course, further illustrates the bias and hostility of the trial judge and his determination to have the tapes played. The Government must prove its case and the trial judge can make no intimation or suggestion that the defendant should offer any defense.

We have already alluded to the fact that there was nothing of an illicit nature in the recordings but we are concerned now with the emphasis and construction that the prosecuting attorneys placed upon the words in the recordings and of course with the trial judge permitting the tapes to be played during the trial and played again during the final argument we deem it well to set forth for the benefit of this Court some of the passages from the tapes (Page 99, transcript of proceedings, April 15, 1964):

"What did they ask you?"

"I just got out. I'm ready to go on home now and I'm not going to answer the phone. They may tap my wire, I don't know and you know, the old man is supposed to call me this evening."

"Well, you didn't admit anything, did you?"

"Well, after all, there is nothing for you to be afraid of. She can say anything, you see, and if you want me to I'll meet you down there Tuesday if they ask you to come back."

"And they wanted to know how much money he has given me."

"Yes, well he hadn't given you anything."

"Yes, well, there's no occasion for me to call you. See, after all you haven't done anything. You've got nothing to be afraid of. She can say whatever she wants to, see".

"But now if I have to have a lawyer, I don't want you."

"Oh, I see. Well, that is up to you, see."

"You see, they are bad losers on this case...you haven't done anything. Miss Smith can say anything. She can probably say she knows me and she knows I never saw her until that day she came in the courtroom."

"...I don't think you need any lawyer."

"...anybody...that would take help and then bite the hand that feeds them...she's just absolutely worthless..."

That about sets forth in the main the contents of the recordings. We have already shown the circumstances under which the witness Gross was forced to make the calls.

In our judgment the record clearly shows that there was nothing of a criminal nature in the calls but we must keep in mind the use made of the recordings and the Assistant United States Attorney made the most of it and the trial judge fully entered into his mood.

There was a renewed motion for severance and at Page 987 of the transcript of proceedings, April 27, 1964, this occurred:

"MR. LAUGHLIN: * * * I would renew the motion for severance * * * Dr. Forte is willing to testify as to Count 2, but not as to Count 1.

THE COURT: Well, he should have told us that a considerable period before this and not wait until after we have been in trial two weeks and then ask for severance.

MR. LAUGHLIN: We made a request for severance * * * more than a week ago.

THE COURT: Yes, after we had been trying the case for a week and the two are intimately connected, so I will deny the motion for severance."

Constitutional Rights
Of Appellants Were Violated

In connection with the tape recordings, obtained in violation of the Federal Communications Act, we desire to stress the constitutional questions. We contend that what was done was in violation of the Fourth Amendment and we ask this Court to pass upon this matter. We also ask the Court to pass upon the constitutional provision that no person can be compelled to be a witness against himself. We also desire to stress that when the telephone recordings were made on March 1, 1963, it was known by Mr. Sullivan and Officer Wallace that appellant Laughlin had been asked to appear before the grand jury five days later -- March 6, 1963. Of course appellant Laughlin knew nothing of the recordings and did testify on March 6, 1963. We call the attention of the Court to Benanti v. United States, 355 U.S. 96, 78 S.Ct. 155. It will be noted that in the Bennati case the Supreme Court did not rest its decision within the scope of the constitutional amendments but relied solely upon the provisions of the Federal Communications Act.

Invasion Of Privacy

We have already stressed the illegal nature of the recordings in that there was a violation of the Federal Communications Act, and constitutional safeguards were violated, but we also desire to point out that there was an invasion of privacy. We call the Court's attention to the book titled "THE PRIVACY INVADERS" by Myron Brenton, 1964, published by Coward-McCann, Inc., New York, New York, and at page 169 we find:

"Technologically, it is possible to alter completely the sense and meaning of what has been caught on tape -- with no way for even an expert technician to detect the alteration. To start with an extremely simple example. Suppose you have said, in a statement recorded on tape, 'I love the United States and hate anything having to do with Communism.' It is child's play to erase a few words, retape the result to produce an intact tape in which you say 'I

love Communism.' Words can be erased, spliced, placed in completely different positions. Even more astounding--and frightening: syllables within a word can be lifted out and put elsewhere to build a completely new word said in your voice but not in the original statement at all. The Subcommittee on Constitutional Rights was told of one experiment in which a speech in favor of God, for motherhood and against Communism was changed within two hours to one admitting the theft of money, advocating the overthrow of the Government, and confessing to the murder of an FBI agent. Not even an electronics expert could tell the altered tape from the original one, though electronic equipment was used in the attempt."

We believe we have amply demonstrated that the recordings were obtained in violation of the Federal Communications Act. It cannot be disputed that the witness Gross was a pawn in the hands of over-zealous and untutored Government prosecutors and to save her own hide she was required to do their bidding. She was threatened with indictment and dire consequences. Of course a consent under such circumstances could not be a valid consent. We will also show in this brief that Judge Youngdahl had carefully considered this matter, conducted a full and complete hearing, and made his ruling. This appears of record. This ruling (222 F.Supp. 264) was binding on the trial judge in this cause. He saw fit to ignore it and overrule it. Judge Curran, in a carefully considered opinion on a motion to dismiss the indictment held that the recordings were in violation of the Federal Communications Act. His opinion is a matter of record at 223 F.Supp. 623. In the Government's motion for reconsideration he considered the matter anew. He also held that the telephone records were not admissible in evidence. His opinion there is a matter of record, 226 F.Supp. 112. It is significant the Government was not satisfied with Judge Curran's ruling. They noted an appeal. The Clerk's office went to great trouble and expense in preparing the record on appeal. The appeal was abandoned. We have set forth that perhaps the appellate procedures were abused and it was an artifice and device on the part of the United States Attorney's office to circumvent the Judges

assigned to Criminal Court in January, February and March of 1964. In any event, it suffices to say that the trial judge was bound by the opinion of Judge Youngdahl. He was bound by the opinion of Judge Curran. He saw fit to overrule and ignore them. Chaos would result if this situation is permitted to continue.

In addition the recordings violated the constitutional rights of the appellants. Things have come to a pretty pass when an attorney specializing in the practice of criminal law cannot telephone the office of the United States Attorney as to pending matters and not have his conversations recorded and later used against him. It is an awesome spectacle to behold when we contemplate that an unscrupulous person is running loose in the Court House with a recorder. No conversation in the Court House would be safe if this is permitted to continue and it is interesting to note that the individual who did the recording in this case is the only person in the Court House permitted to utilize such devices. In addition to what we have already said, there is a willful and deliberate invasion of privacy.

In short, the use in evidence of the recordings in this case not only violated the law but also the constitutional safeguards surrounding the appellants.

II. The lower court misapplied and misconstrued the law of conspiracy and post-conspiracy declarations.

In this case the indictment charged that the appellants, beginning on or about September 1, 1961 up to and including February 20, 1963, conspired with each other and with one Bernice Gross, a co-conspirator but not made a defendant, and the indictment alleged as a part of the conspiracy that they would endeavor to influence the testimony of one Jean Smith (complaining witness in Criminal Case No. 741-61, United States v. Allan U. Forte, ending in an acquittal February 20, 1963). The indictment charged as a part of the alleged said conspiracy the appellants and co-conspirator would and did endeavor to corruptly influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and if the prosecution was not abandoned, Jean Smith was to absent herself and, if she did not absent herself, then to testify falsely. The paragraph numbered 6 of the indictment made certain allegations as to Dorothy Lee Birge. Testimony was received from Dorothy Lee Birge and others with respect to that paragraph and Count Three of the indictment. However, this count was abandoned although the jury was at no time told to disregard the testimony as to the Birge matters.

The Government's case depended almost entirely on the testimony of Bernice Gross. This will be referred to in more detail at a later stage. Jean Smith testified that she had talked with Mrs. Gross on a number of occasions and that she had informed Gross and Detective Wallace as early as the late summer of 1961 that she did not desire to testify in the case (Page 122 of the transcript of proceedings, April 17, 1964). She stated she was told by Gross that the case would probably never come to trial and that she could

always leave town (Page 40, transcript of proceedings April 16, 1964). Smith stated that Gross came to her house in Catonsville and handed her a one hundred dollar bill (Transcript 53, April 16, 1964) and she related further payments of money from Gross (Pages 48 and 62, transcript of proceedings, April 16, 1964). She testified that Gross had talked to her about Wallace and at Page 76 of the transcript we find she was asked as to whether Wallace was ever paid off and her reply was: "Yes, on quite a few occasions". She testified that she had never talked to appellant Laughlin, had never paid any money to appellant Laughlin and that appellant Laughlin had never called her and she had never called him (Page 69, proceedings April 16, 1964). She stated in the trial before Judge Tamm (Criminal Case No. 741-61) resulting in an acquittal of Dr. Forte that she testified fully, that she did not hold back anything, answered all questions and did not evade any of the questions (Pages 69-70, April 16, 1964). She further testified that it was suggested by Gross that she write certain letters to the United States Attorney's office as to her unwillingness to appear (Page 58). She further testified (Page 112) that the letters reflected her wishes and that she was not coerced into writing them and from the first she indicated she did not desire to testify. At Transcript 121 (April 17, 1964) she testified that before she received any call from Gross she had stated that she did not desire to appear as a witness and had so informed Wallace in July of 1961 (121-122). She testified in her conversations that Gross (Page 126), Gross did not mention the name of the lawyer. She stated that when she was in the hospital in July of 1961 as a result of an alleged abortion, her husband did not know she was pregnant. She testified that she had talked to Sullivan in the presence of Wallace (Page 81, proceedings of April 16, 1964). She further testified that she was given a device or Miniphone to record any conversations

with Gross and the device was given to her by Wallace and it was placed in her pocketbook and Gross did not know she had the device. She testified that she was told by Wallace to turn on the device if Gross talked to her. At Page 102, proceedings of April 16, 1964, she testified she was never told to lie on the witness stand. At Page 106 she testified that Gross had called her about twenty times.

It will be seen from the above that Jean Smith had no contact with either appellant and that her testimony related almost in its entirety to conversations with the co-conspirator Gross and of course these conversations were out of the hearing and presence of both appellants.

It is our contention, which we stress herein, that the declarations were not admissible against either appellant until there had been independent evidence establishing appellants' participation in the conspiracy. See Glasser v. United States, 315 U.S. 60, 74, 75; United States v. Consolidated Laundries Corp., 291 F.2d 563; United States v. Stromberg, 268 F.2d 256, and the law further requires that: "Participation in the conspiracy * * * can be established only by proof, properly admitted into evidence, of their own words and deeds". United States v. Russano, 257 F.2d 712. And as set forth in United States v. Consolidated Laundries Corp., supra, and United States v. Stromberg, supra: "Such independent evidence must be substantial and not 'too slight'."

We believe one of the best expressions on the law as to declarations of an alleged co-conspirator is found in United States v. Bentvena, et al, 319 F.2d 916.

Therefore, we strongly stress that none of the declarations should have been received until there had been independent evidence of appellants' participation in the conspiracy and at this point it is well to consider the

existing law on the admissions or declarations of an alleged co-conspirator after the termination of the conspiracy. It will be seen in this case that by the terms of the indictment the alleged conspiracy terminated February 20, 1963 when appellant Forte was acquitted in the courtroom of Judge Tamm. Therefore, the Government must rest its case as to the existence of a conspiracy on the testimony of Bernice Gross. The record clearly shows that she committed many, many acts of perjury. A conservative estimate is in excess of fifty acts of perjury. She was further discredited by the fact that she had been fired from the police department in Baltimore for a gross dereliction of duty. We contend she made no admission or no confession until after the termination of the conspiracy. Therefore, we contend that the rule announced in Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, has application here. The Logan case, we believe, is regarded as the landmark case as to declarations made after the termination of a conspiracy. It will be seen that it is cited time and time again. In Gambino v. United States, 198 F.2d 140, wherein reference was made to Logan, we find:

"However, if the agency is terminated or the conspiracy is over, there is no longer any authority to the agent to act on behalf of the principal or of the accomplice to act on behalf of his co-conspirators."

In Mayola v. United States, 71 F.2d 65, we find:

"There can be no question that the answers of the witness were most prejudicial and if they were not in furtherance of the object of the conspiracy, but merely narratives of past events * * * it was error to admit such evidence."

The Logan Case is cited in both the Gambino and Mayola opinions.

And in United States v. Lonardo, 67 F.2d 83, the Court said:

"We need not pause to consider whether in fact the common purpose had ended, because it would make no difference if it had not. Declarations made by a defendant after his arrest will not, except in most unusual cases, be in furtherance of the common plan."
(Citing cases)

We turn now to the testimony of Mrs. Gross, in her first appearance before the Grand Jury. After being sworn she was told by Mr. Sullivan that the Grand Jury was to investigate alleged bribery by Detective Wallace and also as to any attempt to influence the testimony of Jean Smith (complaining witness in Criminal Case No. 741-61).

In the proceedings before the Grand Jury March 1, 1963, Bernice Gross testified as follows at Page 9:

(By Mr. Sullivan)

"Q Did Allan U. Forte or anyone representing himself to be acting on Forte's behalf approach you and give you any money or anything of value in return for any service or act by you concerning the alleged abortion on Dorothy Birge in '61, on Jean Smith in '61, or on Mrs. Robert Hill in 1963?

A No, sir."

And she was asked this question:

"Q Were you contacted by anyone representing himself to be acting on the behalf of Allan U. Forte and offered money or anything of value for any act or service you might perform in connection with the matter of the alleged abortion of Jean Smith in July of 1961, Dorothy Birge in July of 1961 or the alleged abortion on Mrs. Robert Hill in January of 1963?

A No, sir."

And she was asked this question:

"Q Were you contacted by an attorney representing himself to be Forte's lawyer and offered any money or anything of value in return for any service you might perform in connection with the alleged abortion of Jean Smith in July of 1961 --

A No, sir.

Q -- or Dorothy Birge in July of 1961?

A No, sir."

Q Or Mrs. Robert Hill in January of 1963?

A No, sir."

And then this question:

"Q Other than the pay checks you received from the police department for your official duties did you receive any money or anything of value for anything you did do in connection with the alleged abortion committed by Forte in July of 1961 on Jean Smith?

A No, sir.

Q Or Dorothy Birge of 1961, July of that year?

A No, sir.

Q Or the alleged abortion committed on Mrs. Robert Hill in January of 1963?

A No, sir."

The questioning of Mrs. Gross on her first appearance before the Grand Jury on March 1, 1963, concluded with this statement by Mr. Sullivan, appearing at Page 10:

"Q Mrs. Gross, that concludes our series of questions, and the procedure we are following today is to take care of all witnesses and in case the Grand Jury has any questions based on what they have heard, the witness will be called back. Now we do have some additional two witnesses, one based on some information which we received this morning, and -- well, I discussed it on the phone with you last night, to the effect that Mrs. Smith -- well, just for the information of the Grand Jury, when we spoke on last evening we wondered about what possible reason there could be for the jury coming back not guilty in the case involving the alleged abortion of Mrs. Smith.

A That's right.

Q And I suggested that Mrs. Smith's answers in the trial weren't those strong forceful answers they could have been; there was a little bit of hesitation. And always in an abortion case there is embarrassment. Mrs. Smith, as I told you jurors before, has some four children and there is embarrassment that comes from that and coming to testify.

A That's right.

Q But in any event we have subpoenaed Mrs. Smith this morning to ask her a series of questions and to ask her simply if her testimony was in any way untruthful during the trial. She did testify Dr. Forte performed the abortion but I must ask her too the series of questions in connection with the possible approach by Sergeant Wallace to Forte.

So for the Grand Jury's information, it is 11 o'clock, if you want to take your coffee break which you do at eleven, you can take about twenty minutes' coffee break as usual. We have two other witnesses and I think we can excuse these ladies from Baltimore if everything goes smooth.

Thank you, Mrs. Gross.

(The witness was excused)."

There was a certificate by Oakie Dyer, Shorthand Reporter, that this was a proper report of the proceedings referred to.

After Mrs. Gross appeared before the Grand Jury she was under a virtual command to remain and then an unprecedented thing happened. She was taken to the office of Joseph M. Hannon, Assistant United States Attorney, and for some two to three hours she was badgered, coerced and threatened by Mr. Hannon and Mr. Sullivan. She was reminded time and time again that she had committed perjury and that she could be indicted for perjury. This is reflected in the volume made a part of the record in this case showing interrogation of Mrs. Bernice Gross, Room No. 3439, U. S. Attorney's Office, U. S. Court House, Washington, D. C., Friday, March 1, 1963, and this volume consists of 64 pages. At Page 2 of this Interrogation we find:

"MR. SULLIVAN: * * * We have evidence that you paid out certain money on behalf of them; certain money was received from you in order to get witnesses to lie or to try to get out of coming to trial, to tell a lie on the stand. * * *

MRS. GROSS: That is not true. No, that is not true."

Then this occurred (Page 2, Interrogation of Gross, March 1, 1963):

"MR. SULLIVAN: Your answers then in the Grand Jury are just absolutely clear, there is no doubt about what you said. You said in there you understood what we were investigating and you knew it was an investigation to get truthful answers. That is all we want to do.

MRS. GROSS (Page 3): Well, that is not true. I'll tell you the same thing I did the Grand Jury. I don't know anything, and that is it. Not a thing.

MR. SULLIVAN: Well, here's the thing, Mrs. Gross. We want your cooperation. I'm not saying you're not being truthful about that now but I'm saying we are sure of certain things. We are sure of that call of Forte's lawyer after the trial when he said he was dissatisfied.

MRS. GROSS: No, that isn't true; that isn't true.

MR. SULLIVAN: Someone said he was Forte's lawyer, someone you thought was?

MRS. GROSS: No; no."

Continuing at Page 3, Interrogation of Mrs. Gross on March 1, 1963 in the Office of the United States Attorney, we find the following occurred:

"MR. SULLIVAN: You don't have to say anything about it at all, not a single word, but here's the proposition I want to make to you. We want your truthful testimony, we want it very badly because we want to know who is putting up the money in this case to get witnesses to skip out on the trial or to come to the trial and lie. We want to know that very, very badly, and we know certain approaches --

MRS. GROSS: Well, has anyone skipped out? Have they? I really don't know. I really don't. Who has?

MR. SULLIVAN: Well, the question is, who tried to get people to skip out? Who paid money for that? A lot of people get involved when people try to work out a little scheme to get somebody to lie, and, for instance, if someone put up a little bit of money to contact you, for you to pass on money to Jean Smith, so many people get to know something like that that you can get caught in a bind.

MRS. GROSS: I was caught one time, Mr. Sullivan. I told you. I was caught in the police department. And I think I -- I know I got a raw deal at that time.

MR. SULLIVAN: But that had nothing to do with this.

MRS. GROSS: No, but you know what it leaves on you, it leaves a mark on you and you don't forget it that easily. I never thought I would have to go through this in length again as I did that one time last year. Believe me, I mean that's the truth; I had it then, understand? I thought I could never take anything again; nothing. I don't think I could; I really can't.

MR. SULLIVAN: I'll say this to you. When I talked on the phone last night, and Mrs. Gross and I talked earlier in the case, it has been such a pleasant relation that I feel bad because I have evidence that you are not telling the truth. I feel bad for you

because there are things, and the answers you just gave in the Grand Jury there were clear answers, they were understandable answers, no equivocation. You said you realized the questions were material. You said you understood you had a right under the Fifth Amendment --

MRS. GROSS: Yes, but --

MR. SULLIVAN: You said you wanted to testify. You did testify and the Grand Jury is in position to be able to deliberate as to whether you committed perjury. I want you to know perjury over here carries a two-year minimum jail sentence and a maximum of ten. There is no sense of you getting caught in a bind if you can put the finger on who put this money up. Now we have evidence and it is a simple thing. It is tough for someone to spin somebody who has been given money. It's tough. But don't get caught in a bind yourself.

MRS. GROSS: No, the questions that were asked were mainly about Wallace, and I don't know anything about Wallace.

MR. SULLIVAN: But the questions that were asked you about whether you knew Forte's lawyer, whether Forte's lawyer contacted you --

MRS. GROSS: He had so many lawyers during this 18 months. Am I right or wrong?

MR. SULLIVAN: -- and whether Forte's lawyer gave you some money --

MRS. GROSS: No.

MR. SULLIVAN: -- for something you were to do in the case.

MR. HANNON: Are you saying you might know one of his lawyers but you don't know all his lawyers?

MRS. GROSS: I understand he had a few before this last one came up. I don't know if I'm right or wrong, because I remember in Baltimore where he had seven.

MR. SULLIVAN: Jimmy Laughlin called you in the last several days, didn't he?

MRS. GROSS: What is it that you want out of me, and what will happen to me?

MR. HANNON: The truth.

MRS. GROSS: I know, but I told the truth once before, too. I mean if you can't understand my position.

MR. SULLIVAN: I think I do.

MRS. GROSS: Do you? Because you're not familiar with what happened in Baltimore. You haven't any idea.

MR. SULLIVAN: I'm not, but someone in whose judgment I have some respect said something that made me have a little bit of understanding, and another person, Lorraine Burrell, in there when I said isn't Mrs. Gross off the force now, the way Mrs. Burrell answered -- she seems to be pretty straight and honest; she wouldn't even talk about it. It seemed to impress me that maybe you did get a raw deal.

MRS. GROSS: I did. I say when it happened to you once, and which I told everything that was happening and I was the only one that was dismissed, it stays with you.

MR. SULLIVAN: It sure does.

MRS. GROSS: Maybe you have never been in a position like that.

MR. HANNON: What Mr. Sullivan is suggesting is that you're in the switches again.

MRS. GROSS: I know, and I'm wondering what's going to happen to me.

MR. SULLIVAN: Here's what can happen. If you just simply tell the truth to the Grand Jury about who gave you the money, how much they gave and what they wanted you to get Jean Smith to do, I will tell the Grand Jury that our position is that a wrong has been committed, somebody tried to get a witness taken care of, a lot of money was spent on it, and without your testimony the whole thing falls apart.

MRS. GROSS: Then what will happen?

MR. SULLIVAN: Here's what will happen. I will say to that Grand Jury the U. S. Attorney's Office considers this to be about the dirtiest thing that has happened in a long time in a trial over here, there's been money passed out in the Jean Smith trial, Birge --

MRS. GROSS: I don't know about it. I never met her. I don't know anything.

At Page 7 of the transcript this occurred:

"MR. SULLIVAN: If you tell the truth about what happened in the Smith thing -- I'm the DA that will be handling the Grand Jury; Mr. Hannon came in on it -- and I will say to the Grand Jury alone, or I'll say it with you present, I'll ask the Grand Jury to consider this fact: It is an important case where these people tried to get witnesses paid off, there's a lot of money being spent;

justice can't work out if people are paying money like that; everything fails if the oath fails; but, Grand Jury, there is one thing you have got to do, give us this witness for trial; we need Mrs. Gross; without her we have got nothing, with her we have got something; indict the big fish and let Mrs. Gross be a government witness; without her we have got nothing.

MRS. GROSS: In other words, if Jean Smith had gotten any money would she have testified? If she had gotten anything would she have testified the way she did? Truthfully?

MR. SULLIVAN: She did. Mrs. Smith got several sums of money; later came over here to Washington trying to get out of the case. The specific suggestion was made to her, say your baby is sick tomorrow and you don't have to go. What will I do next time, Mrs. Gross? Next time say you are sick. This thing will be taken care of, it will never go to trial. You say when you get on the stand, Mrs. Smith, you don't recognize Forte. I'm not going to lie, but these letters are written, the gifts of money are made.

MRS. GROSS: Who was supposed to have made the gifts of money?

MR. SULLIVAN: That's what we're hoping you're going to tell the truth about. Well, you passed money on. We know that.

MRS. GROSS: Did I get anything from it?

MR. SULLIVAN: Yes, you did.

MRS. GROSS: I wish I had.

MR. SULLIVAN: Well the last time you didn't. You didn't get it when Laughlin complained he was disappointed.

MRS. GROSS: No, Laughlin never complained to me.

MR. HANNON: You said, did I get any money?

MRS. GROSS: Did I get any money? Am I supposed to have gotten money?

MR. HANNON: You agree that she got some?

MRS. GROSS: I'm believing what Mr. Sullivan tells me, that she got gifts of money.

MR. HANNON: But you're complaining?

MRS. GROSS: No, I'm not complaining. Don't mix me up, please.

MR. SULLIVAN: We don't want you mixed up, all we want is the simple unvarnished truth.

MRS. GROSS: Am I on trial or what?

MR. SULLIVAN: That is your choice.

MR. HANNON: Mr. Sullivan has indicated it is your choice. If you want to talk to a lawyer you are free to talk to the lawyer. I think that in your experience -- you're an experienced police-woman, aren't you? I would say you're in the switches."

At Page 9:

"MR. SULLIVAN: I want to level with you. If you tell the truth about what happened you're not going to get in trouble because I'm going to tell the Grand Jury without you there is no chance of our making the case on the big fish; there is no possibility -- there is a very small possibility, but without you we can't do it.

MRS. GROSS: What's this got to do with Mr. Wallace?

MR. SULLIVAN: The accusation was made against Mr. Wallace; it was a lie; Fort made it up; we know how the story got made up. Now we know; know everything; baby's layette, pink shopping slip, the whole story; the change you kept out of that when payment was made; how much was the gift.

MRS. GROSS: How much was I given?

MR. SULLIVAN: Which time?

MRS. GROSS: Under the baby's layette.

MR. SULLIVAN: Well, --

MRS. GROSS: I mean that's what you said.

MR. HANNON: Who is examining whom now?

MRS. GROSS: You're going by Smith's word, right?

MR. SULLIVAN: Not just Mrs. Smith's word.

MRS. GROSS: Who?

MR. SULLIVAN: Until I know you're on the right team --

MRS. GROSS: I don't want to be on the wrong team, believe me I don't. I was never involved criminally in anything, and I don't intend to start now, believe me.

MR. SULLIVAN: As Mr. Hannon said, you're in the switches. You have got a decision right now which way you are going to go. If you want to be on the right team, the one telling the truth, that is what we want from you, whatever is the truth.

MRS. GROSS: What will happen if I just don't know anything about it? Nothing?

MR. SULLIVAN: Well, the possibilities of what can happen are these: You told a story in the Grand Jury this morning.

MRS. GROSS: That's right.

MR. SULLIVAN: If it is a lie, and we have one witness, that is not a perjury. We have one witness who says it was different and we have other evidence. I'll tell you what we will do. I'll be frank with you.

MRS. GROSS: I want you to.

MR. SULLIVAN: We have something. I'm not going to tell you if you decide to go back to Laughlin and that crowd.

MRS. GROSS: No.

MR. SULLIVAN: I'm not going to disclose my other piece of evidence but believe me, we have got you receiving the layette.

MRS. GROSS: That doesn't bother me. She could have bought it herself.

MR. SULLIVAN: She could have bought it herself?

MRS. GROSS: Sure."

At Page 11:

"MRS. GROSS: Look, the only thing I'm interested in is Bernice Gross. That's the only thing that I'm interested in and, believe me, I don't care about anybody else.

MR. SULLIVAN: All right, fair enough.

MRS. GROSS: Because what I did, it all seemed to come back to me. You all don't know me, it's the first time you ever met me and the first time I ever met you. I used to pull things like you're trying to pull on me, I used to pull on other girls, too. So therefore I have to have a suspicious mind. I don't think you can blame me for it. I was up against the --

MR. SULLIVAN: You were trained to investigate.

MRS. GROSS: That's right, I was trained to investigate and trained to pull all those things, and when the time came I was up against the wall and they said tell the truth and I did and I was charged. At that time I told them I had taken a bath on duty. And I told them I had slept, and it was in a hotel room, it wasn't in the hall or out in the open, and I was charged with sleeping on duty. Anything I had told them, that was what I was charged with. So can you blame me, after six years of never having a charge made against me that I lost my job?"

At Page 17 of the Interrogation we find this:

"MR. SULLIVAN: Let me tell you this. If it came out the way I hoped it would today, and still hope it will, that you tell the truth, I would ask you to tell it to us first, and then when the Grand Jury comes back from lunch and after you have had lunch I will ask you to tell it to the Grand Jury. After that if you wanted to cooperate, and this would be strictly a voluntary thing, I would ask you to call the old man or Forte's lawyer, or both, and I would like to be listening in or have some detective listening in on the other extension, and we would have a case that would be so tight.

MRS. GROSS: Uh hum.

MR. SULLIVAN: And you would be in a position of being the cooperative government witness in the eyes of everyone at that point.

MRS. GROSS: Uh hum.

MR. SULLIVAN: You can picture how tight the case is at that point. Because the call will be expected.

MRS. GROSS: Well I don't know.

MR. SULLIVAN: Well --

MRS. GROSS: I don't know anything about that. I wouldn't even know where to call. I really don't know anything about that.

MR. SULLIVAN: Well we can give you a couple of numbers."

We would suggest to show that the testimony of Mrs. Gross was not voluntary that this Court read all the proceedings in the office of Mr. Hannon. That, as we have pointed out previously, is made a part of the record in this case.

Incidentally we would mention page 60 of the Interrogation of Mrs. Gross in the office of Mr. Hannon on March 1, 1963 where after Mrs. Gross had

been questioned for several hours Mr. Sullivan said this to her:

"A lot of things can be done in the phone conversation. Mrs. Gross can say, look, I told them the whole truth today. He can hang up or he can talk to her. Or Mrs. Gross can say, they had me in there three hours, I'm looking bad because they know I know something; say, I took the Fifth Amendment it must have been 250 times."

After the interrogation in Mr. Hannon's office was concluded, she was taken back before the Grand Jury. See Page 2 of the transcript of her second appearance before the Grand Jury, March 1, 1963. There we find:

"BY MR. SULLIVAN:

Q All right. Are you prepared to swear now that the statement you gave in Mr. Hannon's office between a little after eleven and a little after two this afternoon today was true and correct?

A Yes."

After she testified before the Grand Jury, Mr. Sullivan said this to her (Page 6, second appearance of Gross before the Grand Jury, March 1, 1963)

"Q Fine, but the thing we talked about on the record down in Mr. Hannon's office I'll say it right before the Grand Jury. I said to Mrs. Gross that the big fish behind the operation like this are the ones who are most guilty. The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between, that is the only way to make the case on the big people. We need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation. You would not have to make the telephone call. You see my point?

A I know your point very well. I understand your point very well.

Q Mrs. Gross, you are an experience police woman?

A I am, very.

Q You know the point?

A I realize your point but I say I would rather not. If I did not have to I would rather not. If I had to I would. There is nothing I can do."

Continuing at Page 7:

DEPUTY FOREMAN: Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

MR. SULLIVAN: Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

A Okay.

MR. SULLIVAN: Thank you very much for your cooperation in telling the truth today."

We would very much like to know what Mr. Sullivan said to Mrs. Gross and what was the extent of the "program of operation".

When one Jean T. Smith was before the Grand Jury on March 1, 1963, Mr. Sullivan said this to her: (Page 11)

"BY MR. SULLIVAN:

Q Let me refresh myself and yourself. The night before last when I talked to you at your home in Baltimore by telephone, do you recall telling me at that time that Bernice Gross had told you that she had been called by a man by the name of Laughlin, as Forte's lawyer, and Laughlin said he was disappointed?

A I don't know whether I said his name or she did. I know the name was mentioned, I mean, but I can't remember now whether I said it or she said it.

Q Do you recall when we talked the other night you ever telling me at that time that your recollection was that she said it?

A I may have said that to you."

It is of course no matter of surprise that Judge Youngdahl stated on two occasions that he was shocked when he read these statements. See Page 310, transcript of proceedings before Judge Youngdahl, Criminal Case No. 599-63, October 8, 1963.

We believe it requires little argument to show that what the witness Gross was doing was not a voluntary act on her part and that it was done under duress and under hope of leniency. We believe it is well expressed in the case decided over a century and a half ago in this jurisdiction, United States v. Charles, 2 Cranch C.C. 76, 2 D.C. 76, and also Federal Cases 14786:

"A confession made under the influence of hope or fear cannot be given in evidence."

We recognize that the law of conspiracy sometimes is one leading to confusion. We know that a declaration made by a co-conspirator in the furtherance of a conspiracy is admissible provided there is independent evidence of the existence of a conspiracy. It is also recognized that a declaration of an alleged co-conspirator made after the termination of a conspiracy is admissible only against the co-conspirator or the co-defendant. See Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294. The question often arises even though a declaration or confession is made after the conspiracy terminates, whether the alleged co-conspirator can then testify under oath as to alleged statements made during the existence of the conspiracy. However, in the instant case the record clearly shows that the witness Gross denied emphatically anything having the remotest connection with a conspiracy. She was then taken to the office of the United States Attorney and interrogated. She was also interrogated and questioned by one Detective Wallace, himself a target of investigation. Therefore, under duress and fear she made a statement acceptable to the Assistant United States Attorney and to Detective Wallace and she was even lulled into the matter of making telephone recordings in violation of the Federal Communications Act. We believe, then, that this clearly comes under the heading of Logan v. United States, supra, that the confession or declarations made by her consisted of a narrative of past

events which could not be received. We would call attention to Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716; Fiswick v. United States, 329 U.S. 211; Brown v. United States, 150 U.S. 93; Graham v. United States, 15 F.2d 740. See also Sparf v. United States, 156 U.S. 51, 15 S.Ct. 273. And one of the old cases on this subject arose in this jurisdiction, United States v. Gunnell, 16 D.C. Reports 196, 5 Mackey 196, reading in part as follows:

"Whilst all the acts and declarations of one alleged conspirator may be given in evidence against himself, no declaration of his can be given in evidence against his co-defendant, unless there has first been some evidence offered tending to prove a conspiracy and to implicate such co-defendant and then only those declarations are admissible which were made during the progress of the conspiracy and in furtherance of its object. Declarations which are merely narrative of past occurrences are to be rejected."

We believe this matter is well expressed in Volume 52 Michigan Law Review, Page 1173:

"Declarations made after the conspiracy ends are particularly untrustworthy. Once the conspiracy terminates the interest of every member is to avoid responsibility and shift the blame. What he says about himself by way of admission or confession may well be true and is at any rate against his own interest. But what he says about others may be based on spite, fear, pique, malice, a desire to stand well with the prosecutor or many other motives not leading to truth."

The court misconstrued and misapplied the law as to conspiracy and post conspiracy declarations.

At Page 261 (proceedings of April 20, 1964) the trial judge said this to the jury as to post conspiracy declarations:

"Now I instruct you that any statement made by the defendant Laughlin after the conspiracy ended and the termination of all acts in furtherance of the conspiracy ended, will be offered and received as evidence against Laughlin only."

Likewise, if there should be offered any statements of conversations with Forte after February 20, 1963, they would be received and considered against Forte alone, and these statements,

if any such statements are made and received, would be received only for the purpose of connecting the person who made them with the conspiracy, if you should have already found that any conspiracy was entered into; and any such evidence would not be considered by you as to whether or not the defendants were guilty of the crime of conspiracy because you must find that a conspiracy existed prior thereto, but only as tending to prove the relation which the party making such a statement after the conspiracy, if you find that such conspiracy terminated, may have existed. That is the relationship that existed prior to the time that the conspiracy ended."

The above is not a correct statement of the law. Of course any statement of Gross made after the termination of the alleged conspiracy would be admissible against Gross alone. In the above reference was made to statements of the appellant Laughlin. We assume what was meant was any statement as reflected in the recordings. While there was nothing in the recordings that indicated any existence of a conspiracy but as we have already shown the recordings could not be received at all. In view of the language used as set forth above it would be impossible for any jury to decipher and digest the meaning of it. As was said by Justice Frankfurter dissenting in Delli Paoli v. United States, 352 U.S. 231:

"The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such an inadmissible declaration cannot be wiped from the brains of the jurors",

and in referring to such a cautionary instruction Judge Learned Hand in Nash v. United States, 54 Fed(2) 1006 said that it amounted to:

"a recommendation to the jury of a mental gymnastic which is beyond not only their powers, but anybody else's".

We believe from what has been said that any statement of Gross could not be received and number two, there was no independent evidence of the existence of a conspiracy.

III. Integrity of the Courts is impaired and efficiency diluted when a Judge of equal rank can ignore, disregard and overrule a decision of another Judge in the same Court.

It goes without saying, in our view, that Judge Youngdahl's ruling is the law of the case.

After Judge Youngdahl's ruling in the case set forth at 222 F.Supp. 264, a motion was filed to dismiss the indictment in Criminal Case No. 599-63, United States v. Laughlin, on the ground that unlawful evidence was received by the Grand Jury. The matter was fully argued before Judge Curran and he held that the conversations referred to were in violation of the Federal Communications Act. His opinion is found at 223 F.Supp. 623. It is significant in that case that the United States Attorney's office noted an appeal to this Court, No. 18,299. Accordingly the record was prepared and before same was transmitted to this Court, the Government filed a motion to dismiss the appeal and it was dismissed by this Court. It is also well to point out that after Judge Curran dismissed the indictment in Criminal No. 599-63 (223 F.Supp. 623) the United States Attorney's office filed a Motion for Reconsideration. The basis of the Motion for Reconsideration related to certain telephone records allegedly reflecting telephone calls from one Gross to appellant Laughlin. Judge Curran held that the telephone records were of no validity and disposed of the matter. This opinion is found at 226 F. Supp. 112.

In our judgment the opinions of Judge Youngdahl and Judge Curran definitely disposed of the matter and this will be referred to later in connection with our point on collateral estoppel, referred to by this Court in Travers v. United States, No. 17,828, decided June 11, 1964.

The record reflects that notwithstanding the opinions of Judge Youngdahl and Judge Curran, which were binding on the trial judge in this case, he still permitted the recordings to be played. It is well also to keep in mind that the proceedings before Judge Curran related to Criminal Case No. 599-63, United States v. James J. Laughlin (the case before Judge Youngdahl) but the ruling also was made in Criminal Case No. 600-63, United States v. Forte and Laughlin, the instant case in the court below. Therefore, we contend it is very significant in determining these matters to have in mind that the rulings of Judge Curran were made in this case (Criminal Case No. 600-63 below). In that the trial judge in this case overruled the rulings of Judge Youngdahl and Judge Curran, it is of course necessary to determine whether the factual situation confronting the trial judge in this case was different from the situation confronting Judge Youngdahl and Judge Curran. In other words, we will now point out that the element of consent found to be lacking in the opinions of Judge Youngdahl and Judge Curran were also lacking in the instant case. In fact the matter of duress, coercion and undue influence and hope of leniency was more pronounced in the proceedings before the trial judge in the instant case. We will now make appropriate reference to the record to point this out.

The appellants at no time assumed that the recordings would again be used. When to the surprise of appellants the trial judge intimated that the tapes would be received (Pages 273-274, Transcript of Proceedings before Judge Hart, April 15, 1964), we find:

"MR. LAUGHLIN: Your Honor. Objection we want to make is that it's already -- the law of the case has been settled in this case by the opinion first of Judge Youngdahl, the opinion of Judge Curran, that the telephone calls were made as a result of an inducement or a threat made by -- to Mrs. Gross -- and were not voluntary calls. I submit that that's already been litigated.

THE COURT: Mr. Laughlin, I consider that the decision of Judge Youngdahl and the decision of Judge Curran was made on evidence that was before them at that time, and is the law of the case as to the cases which they themselves ruled on. You will recall that in this very case, Judge Curran refused to dismiss the indictment. He also refused to confiscate, */ or whatever you call it, the tapes themselves.

So that I take it insofar as this case is concerned, no ruling has been made and I will decide it on the evidence as it appears before me.

MR. LAUGHLIN: Your Honor, if you will notice, the opinion of Judge Curran also has this number, the number of this case. Anyway, our point is this, that it has been decided and what we are attempting now to litigate are matters that were before Judge Youngdahl and Judge Curran.

THE COURT: All right, you have your points. I have made my ruling."

The tapes were first played before the trial judge in chambers and then in open court, before a jury was impaneled, the witness Gross was interrogated and she was asked this question by the Assistant United States Attorney (Page 275, Transcript of Proceedings before Judge Hart, April 15, 1964):

"BY MR. LOWTHER:

Q * * *, did you make them willingly?

A No, I didn't.

Q What do you mean by that?

A I didn't willingly come in and agree to make any phone calls, No, I didn't. I can't say I made them willingly, no."

And the witness Gross further replied:

"I did what I thought was best for myself."

At this point the Court intervened (Page 276):

*/ The trial judge was referring to the motion to impound the tapes. They were first impounded before Judge Youngdahl but we assume inasmuch as Judge Curran had dismissed the indictment he felt it unnecessary to impound the tapes and they were returned to the office of the United States Attorney.

"THE COURT: Well, let's go beyond that. To me you were willing but you expected to do what was best for yourself. What do you mean by those two things in conjunction? I don't understand.

THE WITNESS: * * * It wasn't my idea to make the phone calls. I didn't want to make them but again I wasn't threatened if I didn't make them * * * I was looking out for myself."

Again the trial judge intervened and at Page 278 of the Proceedings on April 15, 1964 we find this:

"THE COURT: When you said that you did not do it willingly, did you mean that it wasn't your idea to make them or that you did not want to make them?

THE WITNESS: No, it wasn't my idea. I didn't come to the office that day to make the phone calls. I had no idea of making them."

Before cross-examination began, the trial judge said (Page 279):

"THE COURT: Mr. Laughlin, let me tell you now that the only questions which will be permitted are those that go to the voluntariness of involuntariness of her making the telephone calls, of her permitting them to be tape-recorded and of using them in the trial. Nothing else is going to be permitted."

Then he made this statement:

"Mr. Lowther, I wish you would object if anything else is brought up and we'll handle the matter expeditiously."

At Page 279 objection was taken to this suggestion of the trial judge to the District Attorney. The witness Gross was then cross-examined and she admitted all of the answers she made to Judge Youngdahl were correct. The witness Gross admitted that after she appeared before the Grand Jury the first time, she was taken to the office of Mr. Hannon, Assistant United States Attorney, and interrogated for two or three hours. She was then asked this question (Page 285):

"BY MR. LAUGHLIN:

Q Now then, when you were in Mr. Hannon's office, you were told, were you not, Mrs. Gross, that you had committed perjury?

A Yes.

Q And they -- also you were told what might happen to you? Is that right?

A Yes.

Q And were you afraid then, Mrs. Gross that you might be indicted for perjury.

A I absolutely was.

* * *

Q And that's one reason why you wanted to cooperate, you didn't want to be indicted for perjury, did you?

A No, I didn't.

Q Is that the reason why you cooperated?

A That was one of the reasons.

Q Yes. In other words, you thought it was best for you to do what they wanted you to do so that you wouldn't be indicted for perjury, is that right?

A I was looking out for myself, I sure was."

And then at Transcript 286:

"BY MR. LAUGHLIN:

Q All right. Now, when you were interrogated, you were told also, Mrs. Gross, that you were in the switches, weren't you?

A Yes."

Continuing at 289 of the Transcript, we find:

"BY MR. LAUGHLIN:

Q Do you recall, Mrs. Gross, in the Grand Jury Room on the afternoon when you were there, the Deputy Foreman said:

'Mr. Sullivan, I should like to say this, and I think I speak for the Grand Jury. As regards what you said, that you would rather get the ones responsible for the overall operation. If we don't get cooperation and can't get those, we'll get the ones we can. I think you can tell this witness and any other witness in or out of this room that we'll go after him. We prefer the big ones, but if they make it impossible for us to get the big ones we'll get the little ones.'

What did you understand that to mean?

A I felt that if they couldn't get the big ones, that I would be the one that they would get. (Underlining ours)

Q Yes, and you did not want to be indicted?

A No, I didn't.

Q And that was then, you felt you should cooperate?
Is that right?

A That's right.

Q And therefore, in cooperating you were going to make the phone call, is that right?

A Yes, sir."

It was apparent then, with these damaging admissions on the part of Mrs. Gross, that the voluntariness was virtually out the window and of course it reinforced and gave further validity to the ruling of Judge Youngdahl. The trial judge at this point tried to resuscitate some element of voluntariness, and beginning at Page 290 through 293 we find this:

"THE COURT: Mrs. Gross, on March the 1st, when you made these two telephone calls to Mr. Laughlin's office, certainly a consideration in cooperating with the Government in making those calls was a hope on your part that you would not be indicted by the Grand Jury, is that not correct?

THE WITNESS: Yes, sir. .

THE COURT: And you, of course, did not wish to be indicted by the Grand Jury?

THE WITNESS: No, sir.

THE COURT: But having decided to make the calls, did you voluntarily consent to the induction coil being placed under the phone so that the conversations would be recorded?

THE WITNESS: Yes, sir.

THE COURT: Now, what about the telephone calls of March 13th and March the 18th? By that time were you still apprehensive that you might be indicted?

THE WITNESS: At this point I can't tell you, Your Honor. I don't remember.

THE COURT: You don't recall whether you --

THE WITNESS: I don't recall my feelings as the time, this late, I don't know. But I felt that if I had started I would just finish it.

THE COURT: But again, tell me in your own words, just how you felt when you agreed to make the telephone calls of March 1st?

THE WITNESS: Personally I felt badly. I felt badly for Mr. Laughlin and -- he's an attorney and I didn't want to see him get into any trouble. I felt sorry for myself and it was a long day that day for me and -- I don't know, I felt bad, just felt very badly.

THE COURT: Well, there wasn't any question, or was there, that you knew what you were doing?

THE WITNESS: Oh, I knew what I was doing. I had my full senses about me.

THE COURT: And when the Government -- as I understand it, first the Government's idea was you were expecting a telephone call that evening at your home from Mr. Forte, were you not?

THE WITNESS: I don't believe it was definite.

THE COURT: But there was a possibility of it?

THE WITNESS: Possibility of it.

THE COURT: And at first it was suggested to you that an extension telephone in your house be monitored, was it not?

THE WITNESS: Yes, it was.

THE COURT: And first, in Mr. Hannon's office, you indicated consent and then later in the Grand Jury you objected on the grounds that you didn't want your husband to know about it, is that correct?

THE WITNESS: That's right, yes, sir.

THE COURT: And then the United States Attorney suggested this system of making these telephone calls from the United States Attorney's office and it was his suggestion that this was done, is that correct?

THE WITNESS: Yes, sir.

THE COURT: And when he suggested it, tell me just how you felt about it.

THE WITNESS: Very badly.

THE COURT: Well, did you feel that you have to do it, that you were forced to do it?

THE WITNESS: No, no, sir, I was not forced at any time to do anything. I want to make that clear right now. There was no coercion on my part of anybody's part.

THE COURT: But you did feel that --

THE WITNESS: I just felt --

THE COURT: -- feel it was for your best interest to do it?

THE WITNESS: That's right.

THE COURT: All right. Any other questions?"

Of course it is apparent that the trial judge was determined to have these tapes played. One of our points in this case relates to the bias and hostility of the Judge. What has been set forth above reinforces our contentions in this respect. It is, of course, interesting to see the contrast between Judge Youngdahl and his questioning of the witness as contrasted with the actions of the trial judge in this case. To say the least he was usurping the functions of the prosecuting attorney.

After the trial judge concluded his interrogation of the witness Gross, at Transcript 293 and 294 the witness was asked whether the answers she made in the courtroom of Judge Youngdahl were correct and she responded they were true and correct.

It would seem unnecessary to cite authorities to show that the trial judge was bound by the opinions of Judge Youngdahl and Judge Curran. The following, in our judgment, conclusively support our contentions in this respect:

In Southern Pacific Railroad Co. v. United States, 168 U. S. 1, the Supreme Court said:

"A right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, * * * cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In Edwards v. Terminal Shares, 109 F.2d 974, the Court said:

"Matters distinctly put in issue and determined should not be retried in subsequent phases of the same litigation."

In Gill v. Gill, 79 U.S. App.D.C. 357, this Court said:

"A judgment in prior action between same parties is res judicata on the points and matters in issue and adjudicated in such action."

And in DeMaurze v. Swope, 110 F.2d 564, we find:

"It is highly indiscreet and injudicious for one judge of equal rank and power to review identical matters passed upon by his colleague."

In Donnelly Garment Co. v. N.L.R.B., 123 F.2d 215, the Court said:

"Judges of the same court will not knowingly review, reverse or overrule each other's decision."

See also Collateral Estoppel by Judgment, 56 Harvard Law Review 1, 23, 24, where it is said:

"Where a judgment is rendered against a party and he does not carry the case to a higher court, the judgment is conclusive in subsequent controversies between the parties as to matters actually litigated and determined even though the judgment was erroneous."

While this article related to civil case, the matter of collateral estoppel by judgment in criminal cases is found at 124 A.L.R. 991.

This Court had occasion to pass upon this important matter very recently. In Travers v. United States, No. 17,828, decided June 11, 1964,

this Court said:

"The Supreme Court has held the doctrine of collateral estoppel fully applicable to criminal cases."

This Court in Travers v. United States, supra, cited United States v. Oppenheimer, 242 U.S. 85, and the oft-cited case of Sealfon v. United States, 332 U.S. 575. There was also cited Frank v. Mangum, 237 U.S. 309, where we find:

"* * * A question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. The principle is as applicable to the decision of criminal courts as to those of civil jurisdiction."

The doctrine of collateral estoppel is well recognized and we would like to call this Court's attention to the well written article in 52 Columbia Law Review at 647, which reads in part as follows:

"The importance of the doctrine of res judicata to the proper administration of justice is well established because it enables a judgment to terminate not only the suit in progress but also the dispute which gave rise to the suit. It frees the parties from the fear, burden and expense of repetitious litigation. Almost alone, it distinguishes judicial decisions from mere advisory opinions and endows them with the respect and significance which they command."

We also desire to refer to 56 Harvard Law Review 1, 23, 24; also Restatement, Judgments 69 (1942 Ed.). As we have already indicated, the Government in this case had an opportunity to appeal. They did not an appeal and later abandoned the appeal. In the Restatement, Judgments Section 69 (1942 Ed.) there is a comment on Subsection (2) as follows:

"e. Where a party has a right to appeal but fails to do so. Where a final judgment has been rendered by the court of first instance and the unsuccessful party has a right to have the judgment reviewed by the appellate court but fails to appeal, the judgment is conclusive in a subsequent action on a different cause of action as to questions of fact actually litigated and determined by the judgment. The judgment is conclusive even though an appeal is pending unless the taking of the appeal operates to vacate the judgment (See Sec. 41, Comment d)."

In 28 University of Chicago Law Review at 145 which treats on the matter of collateral estoppel as to its applicability to criminal cases, there is cited United States v. DeAngelo, 138 F.2d 466, and United States v. Simon, 225 F.2d 260. In the DeAngelo case it was held:

"A question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction, whether in a criminal or a civil case, cannot afterwards be disputed between the same parties."

As also 10 Washington Law Review 200; 39 Iowa Law Review 317; 39 Iowa Law Review 217.

In Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, we find:

"Doctrine of collateral estoppel by judgment is not made inapplicable by the fact that present proceedings are criminal where prior proceedings were civil in nature."

And then in the Yates case the Supreme Court said also:

"We agree further that the nonexistence of a fact may be established by a judgment no less than its existence; that, in other words, a party may be precluded under the doctrine of collateral estoppel from attempting a second time to prove a fact that he sought unsuccessfully to prove in a prior action. Cf. Sealfon v. United States, 332 U.S. 575."

Inasmuch as there was an opportunity to appeal and the United States Attorney's office abandoned said appeal, of course the judgements were final and were binding on the trial judge in this case.

We have devoted much space to our contentions in this respect. We believe this was necessary because it was never anticipated that the recordings would be played. Therefore, it was essential to cover the matter in every way possible.

IV. When an affidavit of bias and prejudice, legally sufficient, is filed, the trial judge cannot go into the truth or falsity of the said affidavit.

We had never anticipated that this case would come before Judge Hart. Judge Hart was assigned to Motions Court Number 2, beginning with the month of April. It has never been explained to us how the case was finally assigned to him. However, before any jury was selected in this case we filed an affidavit of bias and prejudice. That was filed on April 16, 1964. The affidavit set forth the following:

"The said judge on or about June 1959 approached affiant (appellant herein) in the National Press Building and asked affiant if he would testify in his behalf before the Judiciary Committee of the United States Senate. The said judge stated that he had been criticised because of his opposition to the Mallory Rule as announced by the Supreme Court of the United States and stated that he had tried very few criminal cases and since affiant's experience in the field of criminal law had been quite extensive, the said judge felt that affiant's testimony would be helpful."

And the affidavit continued:

"Affiant told the said judge that he would testify in his behalf but further stated to the said judge that it was a matter of comment that the said judge had been closely allied with the police and affiant says upon information and believe that the said judge, while a practicing attorney, did on several occasions testify at certain hearings before the House and Senate in favor of the police and had stated emphatically that the work of the police and the prosecuting officials had been hindered and handicapped by the rulings of the Supreme Court of the United States and the United States Court of Appeals and had expressed his belief that the police should have the right to detain suspects in custody for a reasonable period of time to complete their investigative work and he favored legislation to this effect."

And the affidavit said further:

"Affiant says further that the said judge had also criticized the decisions of the courts as to cases arising under the Fourth Amendment, particularly as to search and seizure and suppression of evidence."

And the affidavit said further:

"Affiant says that on June 16, 1959 he did testify at a hearing before the Judiciary Committee of the United States Senate involving Judge Hart. Affiant informed the committee that he could only give Judge Hart only a qualified endorsement on account of his close affinity to the police and that he should alter his stand as to police practices."

And the affidavit set forth that the integrity of the Police Department was at stake and that the indictment against affiant was due to a concerted and organized effort on the part of the United States Attorney's office to protect a police officer who had solicited a bribe from appellant Allan U. Forte and the affidavit went on to say this:

"Affiant says in the instant case it will be necessary to show that although the said Wallace was himself a target of investigation, he was virtually permitted to take over the inquiry, and that he was permitted to interview witnesses before they were taken to the grand jury room and said Wallace also requested that certain witnesses should take lie detector tests."

And the affidavit continued:

"The said Wallace, although himself under investigation, did by various means and designs endeavor to influence witnesses against affiant and did himself aid and abet and assist certain members of the United States Attorney's office in violating the Federal Communications Act."

And the affidavit said further:

"Affiant says he cannot fully defend himself against the allegations of the indictment unless he is able to fully explore every aspect of Wallace's role in this case and the efforts of the United States Attorney's office in the plan to divert suspicion away from Wallace by indicting affiant."

And we find this in the affidavit:

"Affiant says that it is his belief that Judge Hart, due to his close affinity to the police as already referred to, will endeavor in every way possible to protect Wallace and to rule out any attempt on the part of affiant to bring to the attention of the jury the role played by Wallace and others allied with him in this case."

The affidavit was filed and the trial judge, under Willenbring v. United States, 306 F.2d 944, and other cases, could not be concerned with the truth or falsity of the matter. In other words, as we review the cases, he must accept the truth of the allegations and is only concerned with the legal sufficiency. We understand this has always been the rule in Federal courts. After the affidavit was filed, the trial judge said this (Transcript 319, April 16, 1964):

"THE COURT: Mr. Laughlin, I have read your affidavit, and although I cannot, under the rules and under the statute, concern myself with the truth or falsity of it, I cannot help but remark that there are matters in there alleged against me personally, such as that I approached you in the National Press Building in 1959 asking if you would testify on my behalf, which are not true. However, your motion comes too late. This case was sent to me on the 14th for trial. You announced no bias at that time in these matters which you say go back to 1959. Had you announced bias at that time I would have immediately disqualified myself, * * *."

First, as to the timeliness, the affidavit sets forth this:

"* * * while the statute contemplates that the affidavit of bias and prejudice shall be filed 'not less than ten days before the beginning of the term as which the proceeding is to be heard,' it was impossible to file it sooner for the reason that the case was not assigned to Judge Hart until April 14, 1964. In fact under the assignment of judges for the term beginning April 7, 1964, Judge Hart was not listed as one of the judges of the criminal courts and in fact he was listed as the judge assigned to Motions Court No. 2. Therefore, the affidavit is filed at the earliest possible date and of course before the trial gets under way. It was of course impossible to file the affidavit on April 14th nor could it be filed on April 15th in that the court was in session until about 5:30 P.M."

We desire to point out at this stage when Judge Hart made the statement that certain allegations were untrue, it had the effect of accusing appellant Laughlin herein of filing a false affidavit, or, in other words, making a false statement. At Transcript 320, proceedings before Judge Hart on April 16, 1964 we find this:

MR..LAUGHLIN: Your Honor, let me make this observation. Your Honor has made a statement that it was untrue you approached me in the National Press Building. I stand on what I say in the affidavit."

And then the trial judge made the contention it was filed after an adverse ruling came. At Transcript 321 this appeared:

"MR. LAUGHLIN: No, it was based on, I think, some of your comments as to the police, Your Honor. Anyway, I think the record is fully preserved on it, Your Honor."

And to further demonstrate the bias on the part of the trial judge which forms one of our contentions in this appeal, we would refer to Page 322 of the transcript of the proceedings, April 16, 1964, where the trial judge

resurrected an old case, Laughlin v. United States, something that took place twenty years ago in the Sedition trial which had no relevance here.

In that there appeared on the court records a statement by the trial judge to the effect that appellant had made a false statement, on the following day a supplement to the affidavit of bias and prejudice was filed and we refer to Page 116, proceedings April 17, 1964, where the following occurred:

"MR. LAUGHLIN: * * *. The point I wanted to make was this: Yesterday at the beginning of the session when the affidavit was passed up to you, as I understand, Your Honor made the statement as to the meeting in the Press Building -- or words to that effect -- that was an untruth.

Now, this affidavit was under oath but now I ask if Your Honor would withdraw that statement.

THE COURT: Well, Mr. Laughlin, for the purpose of considering your motion, it makes no difference whether it is true or outrageously untrue. The rules require that we consider them as true even though there is not a word of truth in them, and I so consider it.

But, for the reasons I stated, I hold that it was filed too late. I see no reason to withdraw any statement made.

MR. LAUGHLIN: I didn't understand your last.

THE COURT: I see no reason to withdraw any statement.

MR. LAUGHLIN: All right, then, if Your Honor -- then I will have the leave then to supplement my motion, because I not only did talk to you, Your Honor, I talked to you several times in the Press Building. So then I will, with that -- (Pausing)

THE COURT: Well, I don't deny that I have talked with you several times in the elevator of the Press Building, Mr. Laughlin.

MR. LAUGHLIN: The lobby and also in the Press Club.

THE COURT: Lobby of the Press Building and in the Press Club itself.

MR. LAUGHLIN: Yes.

THE COURT: But I never approached you on the matter which you said I approached you on.

MR. LAUGHLIN: All right. All right. All right, of course,

that is Your Honor's version. Mine is the contrary. Now.

THE COURT: I see. Well, we needn't argue on it.

MR. LAUGHLIN: Your Honor is not questioning, are you, that I testified before the Committee.

THE COURT: Not the slightest.

MR. LAUGHLIN: On the day in question.

THE COURT: I have a copy of your testimony in my office. If you would like to see it, it is available to you.

MR. LAUGHLIN: No, no; then there is no question as to that then but Your Honor has one version and I have another; and, as I say again, I adhere to that."

The supplement to the affidavit of bias and prejudice set forth that the trial judge had made the comment that appellant Laughlin's contention as to Judge Hart's approach to him was false, and the supplement, under oath, said this:

"Affiant desires to point out that his allegation was under oath. The remarks of the judge were not.

"Affiant says he does not know why the said judge denies the allegation. Affiant says that it is true that the said judge did approach him in the National Press Building and did ask him to testify as set forth in the affidavit of bias and prejudice. Affiant says it may refresh the recollection of the said judge when affiant points out that on another occasion in the office of the said judge in the Munsey Building (before the said judge received a recess appointment to this Court) that the said judge asked affiant to see Senator William E. Jenner who was then on the Judiciary Committee of the United States Senate to block the reappointment of a judge of a lower court for whom the said judge expressed a personal dislike and that the said judge stated he would like to see the reappointment blocked."

And the supplement to the affidavit further set forth the matter of timeliness in connection with the filing and also set forth that Judge Hart was not a judge assigned to the criminal courts.

After the supplement to the affidavit of bias and prejudice was filed, there appeared in the Washington Daily News on April 18, 1964 an article headed

"Judge Disputes Laughlin Charges". The article in question related to the proceedings in Judge Hart's courtroom on April 17, 1964 when Judge Hart refused to withdraw the remark which in fact intimated that appellant Laughlin had made a false statement in the affidavit of bias and prejudice. The article in question formed the basis for a motion for mistrial and since the Washington Daily News is a paper of large circulation, request was made of the trial judge that he poll the jury to determine whether any members of the jury had read the article. This request was denied (Transcript 198, proceedings April 20, 1964).

As to polling the jury, we believe that was necessary and failure to poll the jury was prejudicial. While it may well be argued that a jury is presumed to follow the instructions of the court as to the reading of newspaper articles, the law in this respect has undergone a change. See Jackson v. Denno, 32 LW 4620, Supreme Court, decided June 22, 1964. In the dissent in that case Justice Harlan said this:

"The Court has repeatedly rejected 'speculation that the jurors disregarded clear instructions of the court in arriving at their verdict'."

And continuing, we find this; citing Opfer v. United States, 348 U.S. 84:

"Our theory of trial relies upon the ability of a jury to follow instructions."

As to the affidavit of bias and prejudice, we contend that it stated matters making it mandatory upon the trial judge to disqualify himself. We believe that a careful reading of this record will show that the trial judge had a personal bias and prejudice against the appellant Laughlin and he should have welcomed the opportunity to remove himself from the case. It seems strange indeed how this case came to him and it is very significant that on the very day the case was sent to Judge Hart, two other Judges of District Court assigned to the Criminal Branch of that court were idle and in a position to take any

case sent to them.

We believe some reference should be made to the contentions made by appellant Laughlin as to Judge Hart's close ties with the police. The motion for new trial in this case set forth this:

"Defendant Laughlin did testify before the Judiciary Committee of the United States Senate on June 16, 1959 and stated he could give only a qualified endorsement to Judge Hart due to the fact that he had consistently condemned the Mallory Rule and had advocated almost unlimited interrogation of suspects while in police custody. At the time of the hearing Senator Eastland of Mississippi came to the defense of Judge Hart and criticized defendant Laughlin for opposing him. It was brought out at the hearing by the then Senator from Colorado, Honorable John A. Carroll, that Judge Hart did have very close ties with the Police Department. Senator Carroll raised the question as to whether in view of Judge Hart's close affinity to the police that he could do justice on the bench when the rights of an accused were at stake."*/

And in the motion for new trial we find this:

"In the course of the hearing, Senator Carroll in referring to Judge Hart said:

'Does he have a personal relationship with the Police Department? Does he manifest great interest in Police work? Was he in constant contact with the Police Department?'

And the motion continued:

"When Judge Hart's law partner was testifying on behalf of Judge Hart, Senator Carroll said:

'You would want a man, would you not, thinking like a judge, and not a judge thinking like a policeman.'

The partner answered:

'I couldn't agree with you more'."

And the motion for new trial continued:

"The law partner of Judge Hart could only refer to one criminal case that Judge Hart had handled. During the hearing Senator Carroll brought out a previous statement of Judge Hart as to suppressing evidence

*/ See proceedings before Judiciary Committee of the United States Senate June 16, 1959 and July 1, 1959.

illegally obtained. Judge Hart had stated:

'There are many students in the law. There are many lawyers who feel merely because evidence is illegally obtained it should be thrown out and the guilty man go free'."

And in our motion for new trial we said this:

"It is a matter of record that lawyers practicing before Judge Hart very rarely indeed have a motion to suppress unlawfully obtained evidence granted."

In concluding this point as to the disqualification of Judge Hart, we believe a careful reading of the record in this case will reflect that Judge Hart was determined at all costs to shield Detective Wallace and he went out of his way to see that there was no intimation in the case whatsoever that Detective Wallace had solicited a bribe from appellant Forte. We will, of course, at a later stage in this brief refer to the acts of bias and hostility on the part of the trial judge, his overwhelming desire to protect Detective Wallace and his efforts to assist the prosecuting attorney and reference will be made to his gestures and intonations.

- V. When in the course of a trial the bias, prejudice and hostility of the trial judge becomes overwhelming, he should forthwith disqualify himself and declare a mistrial.

We well realize that in the average criminal case when the verdict is adverse it is a comparatively simple matter to contend that the trial judge was unfair. In a closely fought baseball game it is easy for the losing team to say that the umpire was wrong in calling balls and strikes and in a closely fought football game it is easy to say that the referee or the umpire was wholly unjustified in assessing penalties. However, we contend and we contend vehemently in this case, that the trial judge was biased and unfair and in many instances insulting. We are setting forth herein different instances which support our contentions in this respect. If it were a matter of one instant, two instances, three instances or four or five instances, it probably would not be sufficient to call for a reversal but when you have two or three dozen instances the picture takes on a different aspect.

At page 136 (Transcript of Proceedings, April 15, 1964), there was a question as to the recordings and the following occurred:

"THE COURT: Mr. Lowther says that they were all played. Do you deny that?

MR. LAUGHLIN: My recollection is they were all played, Your Honor.

THE COURT: All right then, what's the hurly-burly about."

At Page 137 of the same proceedings with Mr. Sullivan on the stand, we find this:

"BY MR. LAUGHLIN:

Q Now, Mr. Sullivan, how many times did you call me on the telephone, sir?

THE COURT: Incidentally, you are wearing two hats here. Which are you wearing at the moment?

MR. LAUGHLIN: I am now interrogating on behalf of Dr. Forte.

THE COURT: These don't relate to Mr. Forte at all, do they.

MR. LAUGHLIN: Well, it's a conspiracy case, Your Honor.

THE COURT: All right. * * *."

There was some questioning between Mr. Sullivan and appellant Laughlin as to the statement that Smith was a call girl and her husband was not the father of the pregnancy resulting in the alleged abortion and this occurred (Transcript 213):

"THE COURT: Who made such a statement?

MR. LAUGHLIN: Well, this was a conversation between Mr. Sullivan and I, Your Honor.

THE COURT: Who made the statement that the husband was not the father?

MR. LAUGHLIN: That came from me, Your Honor, I don't know from --

THE COURT: Well, if you don't know from whom and it's just some wild rumor, please let's not repeat it in the Court.

MR. LAUGHLIN: * * * it's not a wild rumor * * * it was referred to in the recording * * *."

And at 214 Mr. Sullivan stated:

"I have a vivid recollection of telling the Grand Jury that information had been provided to us that was of a derogatory nature on Smith."

At Page 217 of the transcript of proceedings of April 15, 1964 we find the following:

"MR. LAUGHLIN: But the question I asked, Mr. Sullivan, Wallace being himself a target of the investigation --

THE COURT: He has answered your question and you may not like the answer but he's answered it.

MR. LAUGHLIN: * * * I don't think he has answered the question.

THE COURT: Well, I think he has, so that's what counts."

At Page 224 this occurred (with Mr. Sullivan on the stand):

BY MR. LAUGHLIN

Q * * * you were quite angry, weren't you, Mr. Sullivan, when Dr. Forte was acquitted?

THE COURT: Again, what has that got to do with this consent matter?

MR. LAUGHLIN: This goes as to the dismissal of the indictment, Your Honor. * * *

THE COURT: Well, were you quite angry when Dr. Forte was acquitted?

THE WITNESS: No sir, I wasn't angry. I had an emotional feeling which I felt it wasn't of anger; really one of quite a bit of surprise and shock, but I wasn't angry, no, sir.

BY MR. LAUGHLIN:

Q Well, then, as a matter of fact, we discussed it many times, didn't we? We had no words, did we?

A No, sir, we have never had words with each other.

THE COURT: You mean you discussed it many times, but you had no words? What kind of sense does that make?

MR. LAUGHLIN: Well, Your Honor, I don't think you should have made that statement.

THE COURT: Well, Mr. Laughlin --

MR. LAUGHLIN: Your Honor knows what I meant. We didn't have any ill-feeling.

THE COURT: No, I don't know what you meant.

MR. LAUGHLIN: We didn't have any argument.

THE COURT: All right then, say what you meant. You didn't have any ill-feeling or argument.

MR. LAUGHLIN: But, Your Honor, you see, Your Honor makes statements like that; * * * I don't see how Your Honor can possibly try this case on the merits. I honestly don't."

Mr. Sullivan related that before the trial was concluded in Judge Tamm's courtroom (Criminal Case No. 741-61) he, Mr. Sullivan, had information that Mrs. Smith had received a present from Mrs. Gross and he was asked why he did not use that information in Judge Tamm's court. An objection was made and it was sustained and at this stage the following occurred (Page 242):

"MR. LAUGHLIN: Well, Your Honor, I'd like the record to show that I think that this would go to his credibility. If he had such information, I contend it would have been used in the trial before Judge Tamm and I want to preserve that point.

THE COURT: I can hear how much you would have objected if he had tried to use it before Judge Tamm."

At Page 267 of the transcript of proceedings, April 15, 1964, Mr. Garber was questioning Mr. Sullivan in reference to the recordings and whether he had consulted with anyone in the United States Attorney's office or in the Department of Justice regarding authority to monitor phone calls. We find this (Page 267):

"THE COURT: Must we go into this? What has this got to do with it, Mr. Garber? This man is an attorney himself and quite able.

MR. GARBER: * * *what I'm trying to get into now is that there were definite policies in the Department of Justice regarding the monitoring of phone calls.

THE COURT: I don't care what the policy was over there. A United States Attorney up until the time that his commission is revoked, has a right to act legally in any way that he sees fit. So the policy is of no importance to me in determining whether or not Mrs. Gross consented voluntarily.

MR. GARBER: Your Honor, the motion is two-fold. One that is the consent and the other is that it violated Federal Communications Act.

THE COURT: Well, you can argue to me the law all day as you wish on the violation of the Communications Act, but policy in the Department of Justice or the U.S. Attorney's office will have no effect on me one way or the other upon the legality of it."

The witness Sullivan was asked as to whether the Grand Jury investigation

was begun as a result of the bribery accusation against Wallace and at Page 270 we find this:

"MR. SULLIVAN: No, there were several factors. That was one of the factors. Mrs. Birge had stated too, that Wallace had offered her money for perjured testimony and that was one of the factors."

Again at 270 we find the following:

"BY MR. GARBER:

Q * * * at what point did you begin to center your investigation on the Defendant Laughlin?

MR. LOWTHER: Object, if the Court please.

THE COURT: Sustained.

* * *

Q And is Wallace still under investigation?

MR. LOWTHER: Objected to, if the Court please.

THE COURT: Sustained."

In the case of Cone v. Cone, 68 So.Rep. 2d 886, Supreme Court of Florida, sitting en banc, there was a reversal of a judgment based on the remarks and attitude of the trial judge. The opinion sets forth this:

"The chancellor denies some of the chatter attributable to him, but accepting at face value that which he does not deny, it was a crude, vulgar and unbecoming display of a nasty temper. It was away beneath the dignity of a court of justice and descended to the very mudsills of indecorum. It is common knowledge that judges and their decisions are subject to honest, intelligent, or constructive criticism, even an allowable bit of destructive and uninformed criticism may at times be overlooked from one who will not take the pains to inform himself, but to distort and extract from a judgment the insinuations, the misrepresentations and innuendoes that were practiced here and pan them off to the public and the press as intelligent or constructive criticism is inexcusable and does nothing but discredit the administration of justice."

The opinion then went on to recite the necessity of a judge remaining calm and says this:

"From the time he is clothed with judicial authority he is a

marked man. His words and his conduct should inspire confidence; he might well strive to honor the bench instead of having it honor him."

And then the opinion continues:

"More than three hundred years ago one of the great masters of our craft pointed out that a 'much talking judge is no well tuned cymbal'. The function of a judge is to listen, to inform himself, to balance the equities and to mete out justice. He is expected to act his best and inspire the best in others; he should strive eternally to push out and broaden his legal and intellectual horizon. His profession calls for knowledge on so many subjects. Above all he should go easy on vices and strong on virtues. A judge should be deeply sensitive to the dignity of the courtroom and equally responsive to the law and lawyers. Such a brand of conduct begets confidence in the bar and public; it engenders in the public an exalted and merited admiration for the judiciary, which is not acquired by permitting oneself to boil inside, run over at the mouth, then castigate members of the bar or distort appellate decisions. Such conduct falls far short of constructive criticism."

The opinion continues:

"In this a lawyer is the right arm of the court, and while he may be disciplined for improper conduct it is highly improper for a judge to give way to a burst of passion and discredit a lawyer for nothing more than an attempt to conduct the litigation within proper bounds. The judiciary is in fact no place for the exhibitionist, one who has not matured emotionally or one who cannot restrain his passions. * * * A judge increases his stature by exhibiting a sane sense of the important, by the wealth of his knowledge, the wisdom of his decisions and the extent to which he squares his conduct with approved moral and professional standards."

Buckley v. 2570 Broadway Corporation, 207 N.Y.S. 2d 484. In that case the Court held:

"While a trial judge is not reduced to such constraint that he may not make remarks on occurrences during the trial, he should at all times maintain an impartial attitude and exercise a high degree of patience and forbearance, and the development of the facts in the presence of the jury, so far as is humanly possible, should be uncomplicated by personalities and acrimony."

Giglio v. Valdez, 114 So.2d 305:

"The jury has a right to look to the judge for guidance, for the maintenance of the dignity and decorum essential to the proper

administration of justice and is in short, as a personification of fairness and equality before the law * * *. When the trial gets out of bounds, or when the judge demonstrates his ill feeling and animosity toward one of the lawyers, it is not the lawyer who suffers, rather it is his client who is being deprived of the high level of justice that is the handiwork of a fair, temperate and impartial mediator in the judge's chair."

In Re Parkside Housing Project, etc. v. City of Detroit, etc., Supreme Court of Michigan, 287 N.W. 571. In that case the Court referred to an earlier Michigan opinion, Schwanz v. Wujek, 163 Mic. 495:

"It is sufficient to say that jurors are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge. This well known fact should always, and it usually does, so impress itself upon the mind of the court that manifest leaning toward one side or the other is impossible."

Kamen Soap Products Co. etc. v. National Factors, Inc., etc. 201

N.Y.S.2d 375. That case held:

"Where there were repeated lengthy cross examinations of witnesses of plaintiffs by trial judge, constant interruptions by trial judge of answers of witnesses, and unnecessary criticism of plaintiff's counsel by trial judge, and trial judge so far injected himself into proceedings the jury could not review case in calm and untrammelled spirit necessary to effect justice."

At Page 263 of the transcript of proceedings, April 20, 1964, we find this:

"MR. LAUGHLIN: Your Honor, I think it is incumbent upon you to advise the witness Gross as to her rights in this matter.

THE COURT: I think the witness Gross is a former police officer, and during the course of the Grand Jury hearings and whatnot, she has been advised many times of her rights, and I don't think it is necessary for me to warn her any more.

MR. LAUGHLIN: All right. Of course, Your Honor also is aware that she's admitted committing many, many acts of perjury.

THE COURT: Yes. Yes, I am quite aware of that."

See also Pages 266 through 268 of the same proceedings, April 20, 1964.

At Page 295 of the proceedings before Judge Hart on April 21, 1964, Mr.

Lowther was asking Mrs. Gross about a conversation between September 11, 1961 and February 20, 1963. The court intervened as follows at Page 296:

"THE COURT: Wait a minute. Again, Mr. Lowther, are you sure you have your dates right? You are talking about September, 1961?

* * *

THE COURT: It is my recollection that Mr. Laughlin only entered his appearance in 741-61 on April 20th of '62."

At Page 308, when objection was being made to the admission of the tapes, this occurred (Page 308, Transcript of Proceedings, April 15, 1964):

"MR. LAUGHLIN: * * * I want to say frankly it appears to me, Your Honor wants to admit these tapes.

THE COURT: Wants to, what do you mean, wants to admit the tapes?"

See also Pages 308 to 313 of the proceedings of April 15, 1964.

After the trial judge stated he would admit the tapes, this occurred (Page 315, Transcript of Proceedings, April 15, 1964):

"MR. LAUGHLIN: All right. * * * let me finish.
* * *. So frankly, I don't see how Your Honor could fairly and justly try this case.

THE COURT: Why, Mr. Laughlin? Is it simply because I have ruled against you?

MR. LAUGHLIN: It isn't a question of ruling, itself; you have ruled against Judge Youngdahl and Judge Curran, and also your comments you have made during the day.

MR. LOWTHER: Your Honor, may I make one remark, please?"

Continuing at Page 316:

"THE COURT: Yes.

MR. LOWTHER: I want this Court to know that the Government's position is the Government feels these defendants would get a fair trial before this Court. I say that not only as an individual, I say it in my capacity as Assistant United States Attorney and I have no hesitancy in saying that I speak for the United States Attorney himself. * * *.

MR. LAUGHLIN: Well, Your Honor, let me say this: He can make his comments. He moved Heaven and earth to keep any proceedings from Judge -- before Judge Curran; he moved Heaven and earth to keep any proceedings coming before Judge Holtzoff.

Now, he has a right to his view, I have a right to mine, Your Honor."

At Page 149 of the transcript of the proceedings before Judge Hart on April 17, 1964, request was made that during the recess the appellants have the opportunity to read over the Grand Jury testimony of Mrs. Gross and we find this:

"MR. LAUGHLIN: May I then have the right to take it back to my office with me, and return it then when we convene in the afternoon?

THE COURT: Well, I assume so. Are you going to waste that much time going back to your office at lunch?

MR. LAUGHLIN: Well, I always go back for lunch.

THE COURT: All right.

MR. LAUGHLIN: I can't regard it as a waste of time, however, Your Honor.

THE COURT: I don't say it is a waste of time to --"

At Page 487, transcript of proceedings, April 22, 1964, Mr. Lowther made a statement to the court that a certain call or calls had been made to the Hecht Company with regard to the witness Gross and at Page 488 this occurred:

"MR. LAUGHLIN: Well, Your Honor, let me say this: I don't know what counsel was referring (to), whether he had anything to do with the calls or whether this was just a plan to --

THE COURT: It's not likely that the Government counsel would have anything to do with them.

MR. LAUGHLIN: Well, Your Honor is jumping to conclusions. * * * All I can say is in the last few days I have had a number of calls. I know nothing about any call to the -- any of the newspapers, I -- only think there is only two or three people on the news I made (sic), but I have received a number of calls with respect to this

case from newspaper people and from people elsewhere as to this testimony of Bernice Gross, her participation in it, and in their answer to it.

I, frankly, told them about my view on Gross. Also my view on Wallace, so I contend there's been no secret and nothing that has been said (sic) has been said, other than what is in the pleadings in this Court and, as to any attempt to intimidate Gross, I might say he made the same sort of accusation, Your Honor, the same counsel, before Judge Youngdahl; and for that matter, of course, I don't suppose anyone has been -- anyone has been, probably, harassed more than Dr. Forte.

Of course, I have told him in the beginning, he's got to expect that and he's just got to bear with it until the thing is concluded.

THE COURT: All right; I have nothing further to do with that matter.

At Page 511 of the transcript of proceedings, April 22, 1964, with Mr. Sullivan testifying, this occurred:

"MR. LAUGHLIN: 8 8 8 he said he has certain notes of his recollection -- may they be made available?

THE COURT: Do you have such notes?

THE WITNESS: I do have certain notes, Your Honor -- well, I didn't make them at the time of the conversation, but subsequently upon hearing the conversation I jotted down certain phrases. Yes, sir, Your Honor, and I do have those in my office.

* * *

THE COURT: Well, Mr. Laughlin, you have several pages of things that you have apparently jotted down from listening to the same tapes.

MR. LAUGHLIN: Certainly. * * * I have a right to see his notes, whether it's in contradiction or impeaching of any other think that has been said.

* * *

At page 554 of the transcript of proceedings, April 22, 1964, the witness Gross was being questioned on cross examination and we find this:

"BY MR. LAUGHLIN:

Q Mrs. Gross, how much have you collected, all told, in witness fees since February of '63?

A Oh, I don't remember.

Q Would it go into the hundreds of dollars?

A I don't think so.

Q You have no record of it anywhere; is that right?

A No, sir, I don't.

Q All right, and --

THE COURT: Are you talking about statutory witness fees that are provided by law?

MR. LAUGHLIN: Yes, I am."

And continuing at 555:

THE COURT: Well, what has that got to do with this case?

* * *

THE COURT: Are you contending that she's making a living out of witness fees?

MR. LAUGHLIN: Well, I have known people to prolong court litigation for the sake of a witness fee, * * *."

Also at 555 we find this:

"BY MR. LAUGHLIN:

Q Now, Mrs. Gross, when you were here in March of '64, was that your fourth or fifth appearance before the Grand Jury * * * Since February of '63.

A I think it was my third.

* * *

Q When was your first?

A Let me see. I believe that was back in March of '62.

Q '62?

A I think so.

THE COURT: '62 or '63?

MR. LAUGHLIN: All right. That would be two years this March; is that right?

A I am confused on this; before your last trial, Mr. Laughlin, when was that?

MR. LAUGHLIN: Well, -- I don't see any humor, Your Honor. I think Your Honor shouldn't smile on a matter like that. I regard it as entirely serious; even though the answer may strike you as humorous, it doesn't strike me.

THE COURT: Well, the answer didn't strike me as humorous, Mr. Laughlin. The Court, I think, is entitled to smile occasionally. I consider the matter altogether serious, but I think I am entitled to smile on occasion. */

Mrs. Gross was being questioned as to certain proceedings before the Grand Jury and at Page 569, proceedings of April 22, 1964, this occurred:

"MR. LAUGHLIN: In the Grand Jury Room * * * she made the statement that she didn't know anything about Wallace. I think, further, at some stage, that he was an honest officer. Now, she makes this statement in the record: 'Are they on to you?'."

THE COURT: I am talking about what she has testified to on the stand. You have to show something to contradict something that she said on the stand in this case. Now, if it doesn't, I won't permit it. That is it. I am finished. Return and question the witness.

(IN OPEN COURT:)

MR. LAUGHLIN: * * * Your Honor, I want the reporter to repeat to me the question that was ruled out so I can be guided by that.

MR. LOWTHER: If Your Honor pleases, I will object to that.

MR. LAUGHLIN: Only in a low voice.

THE COURT: No. Go back and state your question.

MR. LAUGHLIN: Well, I object to Your Honor's attitude, Your Honor's demeanor.

THE COURT: You may object to my attitude and --

*/ Of course the answer made by Gross was not responsive to the question and under ordinary circumstances before an unbiased judge it would give rise to a mistrial.

MR. LAUGHLIN: And I want the record to show we do not object for the reasons stated, and I think that under the various cases we have to put that on record."

At this point appellant Laughlin conferred briefly with Mr. Garber, his counsel, and continuing at Page 570 this colloquy appears:

"THE COURT: Mr. Garber, you are two separate counsel in this case, and you are continually, apparently, feeding questions to Mr. Laughlin. Now, that is all right if you do not intend to cross-examine this witness yourself, but if you do intend to, then that is not right because in effect it is permitting double cross-examination of the witness by you.

MR. GARBER: Well, Your Honor, Mr. Laughlin was consulting me about these matters, and I was trying to refresh his recollection on certain --

MR. LAUGHLIN: I was -- I think what was done was entirely proper. I think Your Honor's remark was improper.

THE COURT: All right."

And then continuing on Page 571 we find this:

"THE COURT: * * *but you have been conferring with him constantly during this questioning.

BY MR. LAUGHLIN: (Witness Gross on stand)

Q Now, in these recordings -- there, of course, you did mention Wallace's name many times --

MR. LOWTHER: To that I will object, if the Court pleases.

THE COURT: Sustained."

It was the contention of appellants that a Grand Jury ("in the wings") was being used for discovery proceedings and hence an abuse of Grand Jury process and at 584 of the proceedings of April 22, 1964 a full hearing was requested in conformity with Dardi v. United States, 330 F.2d 316. This occurred (Transcript 584):

"THE COURT: It would seem to me, * * * what they are doing is investigating a possible charge of perjury against you.

Does that appear to be true to you?

MR. LAUGHLIN: Well, Your Honor, I think that, not on what's in the transcript; I think we are entitled to have that from testimony, Your Honor.

And at Transcript 585:

"THE COURT: That wouldn't stop them from reindicting you, would it?

MR. LAUGHLIN: Well, Your Honor, you're asking me legal questions -- Well, Your Honor, --

THE COURT: Let me say, I don't think it would stop them from reindicting you.

MR. LAUGHLIN: * * * They can indict anybody they want to, at any time, for anything, anybody that has the process of the District Attorney's Office. * * *

THE COURT: My failure to respond to that doesn't mean I agree with your statement, but go ahead."

At Page 610 of the transcript of the proceedings of April 22, 1964, Gross was being questioned about her interrogation in the office of Assistant United States Attorney Hannon and Sullivan and the trial judge was trying to make much of the fact that she was not under oath in that proceeding. It is true that at the beginning an oath was not administered to her. However, she had been under oath in the Grand Jury proceedings some two hours before and it is very significant to note that after this 'brainwashing' and badgering in Mr. Hannon's office she was taken back to the Grand Jury room and then reminded she was still under oath and asked whether or not she did not swear to the truth of everything said in Mr. Hannon's office, and this occurred at 610 of the transcript:

"THE COURT: Well, now, now, now; that particular statement was not under oath, was it?

MR. LAUGHLIN: Well she had been under oath, Your Honor, and she had been under oath, I take it, all day.

THE COURT: Well, she was not under oath at Mr. Sullivan's office, was she?

MR. LAUGHLIN: * * * I must disagree with you there, because she was under oath and they took her to the District Attorney's Office and they got the Grand Jury reporter.

THE COURT: She was under oath to tell the truth to the Grand Jury, isn't that correct, and when she left and went to Mr. Sullivan's office she was no longer under oath, I believe.

Is that Correct, Mr. Lowther?

MR. LOWTHER: May I have the transcript, Your Honor?

MR. LAUGHLIN: It shows Grand Jury original, Your Honor, got the heading of Grand Jury number.

THE COURT: Has a Grand Jury number, but it wasn't in the Grand Jury Room and it wasn't before the Grand Jury.

MR. LAUGHLIN: Yes, but the Grand Jury reporter was there, and an oath had been administered."

And then this occurred with Gross still on the stand (Transcript 611, April 22, 1964):

"BY MR. LAUGHLIN

Q Let me ask you: Did you understand you were still under oath, Mrs. --

A No, sir, no, sir, I did not understand that.

MR. LAUGHLIN: All right, now. But I submit, Your Honor, that she was under oath. She was under oath.

THE COURT: Well, I don't think so. It doesn't make any difference.

In any event, where she said she was not telling the truth, that's it.

MR. LAUGHLIN: Well, all right, we'll put it that way and then I will omit the last."

And at 613 this occurred:

"BY MR. LAUGHLIN:

Q At this point let me ask you -- we'll come to it later, Mrs. Gross -- but at a later stage when you were brought back before the Grand Jury, you were asked the question, were you not, as to whether or not everything you said in the Grand Jury -- under oath --

(The court intervened)

THE COURT: Wait. If you are going to read that, read the question and read the answer.

MR. LAUGHLIN: Well, all right, I'll have to find it, Your Honor, if you will allow me a moment.

THE COURT: Well, Mr. Laughlin, couldn't we proceed chronologically and you finish with the matter in Hannon's office?

MR. LAUGHLIN: Yes, but I think this one question is going to help.

THE COURT: All right; we'll find it.

MR. LAUGHLIN: I realize, but we've got a lot of field-- we've got a lot of material to cover, Your Honor, and I see no need for haste, and I think it's all important. * * *.

THE COURT: No need for haste, Mr. Laughlin, but it is desirable that we proceed with reasonable expedition."

And at Page 614, we find the following:

"BY MR. LAUGHLIN: (Mrs. Gross on the stand)

Q Now, when you were brought back before the Grand Jury, later that afternoon, after you had been in Mr. Hannon's office, you were asked this question, were you not:

'Are you prepared to swear now that the statement you gave in Mr. Hannon's office between a little after 11:00 and a little after 2:00 this afternoon, today, was true and correct?

'A Yes

"Q It was true and correct?"

And you answered by nodding your head; is that correct?

A Yes.

Q You did then later swear that what you said in Mr. Hannon's office was true?

A Yes.

Q All right. Now, then, you were asked this question and did you make this answer: --

THE COURT: This is in Mr. Hannon's office, I take it?

MR. LAUGHLIN: Yes, I am coming back now. The only reason, I thought, in view of Your Honor --

THE COURT: Just so the record knows what you are doing.

MR. LAUGHLIN: Yes, sir. The reason I am doing that, Your Honor raised the point that when she was in Mr. Hannon's office she was not under oath. Your Honor brought that up. Therefore, I want to show that at a later time she swore she made -- she made oath that what she said in Mr. Hannon's office was true, so I am coming back to that."

On April 23, 1964, the matter came on for further trial and at Page 669 of the transcript of proceedings we find:

"MR. LAUGHLIN: Your Honor, before the jury comes in I would like to make a statement. Several times yesterday several calls came to my office, and then the party would hang up. Two calls came to me somewhere around midnight last night. The name Wallace was mentioned. Now, if it's being done through Lowther here, I would ask you, Your Honor, to tell him not to do it. If it's been done through Wallace, I would ask that it not be done. I also would like to have assurance whether there is any monitoring or any interception of my telephone at this time.

THE COURT: Do you have any evidence whatever that either Mr. Lowther or Mr. Wallace have done this?

MR. LAUGHLIN: No, I don't know. I don't know who did it.

THE COURT: All right. I don't think that this Court is going to presume Mr. Lowther would do such a thing. As a matter of fact, this Court would presume that Mr. Lowther would not do such a thing. Sergeant Wallace, I know nothing about. I do not know the gentleman and I am frankly not concerned with him, and I do not think he has anything to do with this case. I have no reason whatever to believe that your telephone is monitored, tapped, or whatnot. If it were it would be quite illegal, as far as I can see, and that would be for the proper authorities to take care of.

MR. LAUGHLIN: Of course it has been tapped. I think you will recognize that.

THE COURT: No, I don't know that your telephone has been tapped.

MR. LAUGHLIN: Well, it has the same effect, the recording device, I think --

THE COURT: There were certain conversations which were recorded.

MR. LAUGHLIN: And which I think amounts to the same thing.

THE COURT: Well, perhaps, but --

MR. LAUGHLIN: Well, anyway I make the request. I thought I would call it to the attention of the Court. I did in the last trial, had assurance (sic). Judge Youngdahl had the parties come in and give me assurance that there had been no device put on my phone or next to it.

THE COURT: Well, I haven't any reason to believe that anything has been put on your phone. Therefore I have no reason to take any such action."

The indifferent attitude of the trial judge in this cause is in marked contrast to the action taken by Judge Youngdahl. Judge Youngdahl, in Criminal Case No. 599-63, brought Mr. Sullivan and Officer Wallace into the courtroom and made them state that there would be no interference with the telephone services of appellant Laughlin.

At Page 677 of the transcript of the proceedings of April 23, 1964, appellants made a request that the witness Jean Smith be recalled and the following occurred:

"MR. LAUGHLIN: I would ask then, Your Honor, that Mrs. Smith be recalled in view of this.

THE COURT: You may recall Mrs. Smith whenever you wish to recall her.

MR. LAUGHLIN: Then, Your Honor, would you have the Marshal have her here this afternoon?

THE COURT: No, I am going to have her put on in your case, if you wish to recall her.

(We desire to stress that this statement was made in the presence of the jury.)

MR. LAUGHLIN: Well, Your Honor, the statement that was made the other day, I would not have agreed to her being excused. You made the statement on condition that she be brought back whenever I want her.

THE COURT: If you wanted to use her and she will be brought back whenever you want to use her.

MR. LAUGHLIN: I would like to use her this afternoon then as part of the government's case.

MR. LOWTHER: I haven't finished my case yet.

THE COURT: You cannot use her as part of the government's case. You can use her as part of your case.*

MR. LAUGHLIN: Is it your -- all right, I will propound these questions then, Your Honor.

THE COURT: If they are questions concerning what Mrs. Smith said in this meeting, you will not propound them. Remember what you are doing. What you are doing is using a statement of Mrs. Gross given in the office of Mr. Hannon for the purpose of attempting to attack her credibility. Now, that is what the purpose of these questions which have been going on for several hours is and you cannot attack the credibility of this witness by something that was said in there by Mrs. Smith. It is quite simple.

MR. LAUGHLIN: Well, I submit that since both of them were in the room and that both witnesses heard what was being said, I submit it is entirely proper.

THE COURT: All right and I say it isn't and I have ruled against it. That is the end of that. Now, let's go on to something else.

At this stage an offer of proof was made.

At 696 of the transcript of proceedings, April 23, 1964, with Gross on the stand, this occurred:

"BY MR. LAUGHLIN:

Q All right. Now then, when you called did you tell me it was being recorded?

MR. LOWTHER: Objected to, if the Court pleases.

THE COURT: Sustained. Mr. Laughlin, we will replay the tapes, if you wish. The whole matter is on the tapes.

*/ This was highly improper. The trial judge was trying to force the appellants to say that they would offer evidence in their own behalf and there is no requirement of law that this be done. Of course such a statement in the presence of a jury was highly prejudicial.

MR. LAUGHLIN: Well, that's all right. Your suggestion, I submit, is unnecessary. Of course they have been played. I have a right, I submit, to interrogate her under the circumstances that took place in Mr. Acheson's office.

THE COURT: I sustained the objection to your last question."*/

At 712 and 713 of the transcript we find the testimony of Mrs. Gross as to the contents of certain letters allegedly suggested to her by appellant Laughlin:

"BY MR. LAUGHLIN:

Q Now, since you were on the Abortion Squad in Baltimore for quite some time, from time to time you had similar letters, haven't you?

MR. LOWTHER: Objected to, Your Honor, it is not material to this case.

MR. LAUGHLIN: I think it goes to credibility, Your Honor.

THE COURT: Sustained."

And at 713, with Gross on the stand, this occurred:

"Q Now, at that time Mrs. Smith had told you, had she not, that she did not want to proceed with the case?

MR. LOWTHER: Objected to as gone into yesterday, Your Honor.

THE COURT: Sustained.

BY MR. LAUGHLIN:

Q In the summer or the fall of 1961 had Mrs. Smith ever indicated to you that she wanted the case dropped?

MR. LOWTHER: Objected to, Your Honor, it was gone into yesterday.

THE COURT: Sustained.

*/ This, of course, was highly improper. The trial judge was determined the tapes would be admitted in evidence. They were received and played and his remark: "We will replay the tapes, if you wish. The whole matter is on the tapes" is compounding a wrong already done.

her own behalf and she did not. The uncalled-for remark of the trial judge in this case was to create the impression that Mrs. Gross had been badly treated by the police authorities in Baltimore and that the Trial Board hearing was virtually a mockery of justice. All of this in the presence of the jury, of course, could have a very bad effect insofar as the appellants were concerned.

At Page 725 of the transcript of the proceedings of April 23, 1964, the witness Gross testified that the wording of the letters to the United States Attorney by Mrs. Smith was suggested by appellant Laughlin and that appellant Laughlin had suggested the use of the word "rekindle", and this occurred:

"BY MR. LAUGHLIN:

Q What is your understanding of the meaning of the word 'enkindle' (sic)?

MR. LOWTHER: Objected to, if the Court pleases?

THE COURT: Sustained."

After appellant Laughlin had finished the cross examination of the witness Gross on behalf of appellant Forte, it is of course well understood that Mr. Garber had a perfect right to proceed with cross examination of the witness. At 733, the court intervened as follows:

"THE COURT: Mr. Garber, you have been constantly talking with Mr. Laughlin throughout his examination and presumably suggesting matters to him. Do you have some questions?*/

At Page 742, Mr. Garber was questioning Gross as to the statements made to her by the witness Smith, that she was reluctant to be a witness in Criminal Case No. 741-61. This occurred:

"MR. LOWTHER: Objected to, if the Court pleases.

*/ Of course Mr. Garber representing appellant Laughlin had a right to proceed with cross examination. The mere act that he had conversed from time to time with appellant Laughlin did not in any manner change the situation.

THE COURT: Really, Mr. Garber, I hardly see any relevance in this. Whether she was reluctant or not does not affect this case, and I think common sense would dictate that any witness who was the chief witness in an abortion trial would be reluctant to testify, wouldn't he?

MR. GARBER: Yes, Your Honor, but I'm trying to find out whether or not this witness was made aware of that."

Continuing at 743, we find:

"MR. LAUGHLIN: Your Honor, I think your remark 'is common sense'(sic), I ask that that be withdrawn. I think that is improper, Your Honor. I think all those matters are for the jury.

THE COURT: They are definitely for the jury. Go ahead, Mr. Garber.

At Pages 749 and 750 Mr. Garber was interrogating the witness Gross about her statement in Hannon's office:

"BY MR. GARBER:

Q (Reading) 'MRS. GROSS: That's right. I was trained to investigate and trained to pull all those things, and when the time came I was up against the wall and they said to tell the truth and I did and I was charged'.

Do you recall that?

A Yes, I do.

Q Now, do you feel Mrs. Gross, that by telling the truth, the truth got you into trouble?

A I felt that I had told the truth and by what I had told them, that's what they charged me with."

And the Court intervened as follows (Tr. 749, April 23, 1964):

"THE COURT: You are not talking about the Baltimore matter?

THE WITNESS: Oh, I don't know what he's talking about.

MR. GARBER: I am talking about the Baltimore matter.

THE COURT: Then make it clear to the witness what you are talking about. You are talking about her being discharged from the police force for taking a bath and sleeping on duty."

Of course it was highly improper and highly injudicious for the trial

judge to make this remark. The trial judge knew nothing about the facts of her discharge from the police force in Baltimore and this being in the presence of the jury could only prejudice the appellants in that it gave the impression that the police department in Baltimore had done her a great injustice.

At Page 755 of the transcript of the proceedings on April 23, 1964, Mr. Garber was questioning the witness Gross as to the various persons with whom she had talked and this appears:

"BY MR. GARBER:

Q Now, Mrs. Gross, from May of 1962 until your appearance before the Grand Jury on March of 1963, other than Mrs. Smith, Dr. Forte and Mr. Laughlin, as you have testified, have you ever discussed your role in this matter with anyone else?

A No, I have not.

Q I take it your husband was not aware of what you were doing; is that correct?

A No, he was not."

And here the court intervened as follows:

"THE COURT: Now, wait a minute. You certainly discussed it with the Grand Jury and with Mr. Sullivan.

Of course this again points out the bias and prejudice of the trial judge and from a reading of the record from beginning to end it will be seen that at no time did he ever make any suggestions helpful to the appellants. His suggestions were always on behalf of the Government or Government witnesses.

Also at 755 we have this:

"MR. LAUGHLIN: Your Honor, I think the record should show that I don't believe it is your function to make suggestions to the witness when she is testifying.

THE COURT: All right, Mr. Laughlin, the record will show that."

And at Page 768, this occurred:

"THE COURT: While you are here, when do you want Mrs. Smith back for your case, which of course you may examine her as an adverse witness.

* * *

MR. LAUGHLIN: Well, Your Honor, we want to call her as part of the government case, further cross-examination.

MR. LOWTHER: If the Court pleases ---

THE COURT: What is it? I don't know that you have any right to recall her for further cross-examination. You announced you had completed your corss-examination.

MR. LAUGHLIN: No, no.

THE COURT: Yes.

MR. LAUGHLIN: It was true at that time that I said to you, and then I requested, I think we ought to get the transcript. I said to you I would agree to excuse her on condition that, to bring her back if anything further developed. That doesn't mean our side of the case by any means. That means further cross-examination. Had I known that I never would have agreed.

THE COURT: You cannot cross-examine witnesses in chunks."

The above further illustrates that the trial judge was trying to force appellants to say that they would offer evidence in their own behalf.

And at 731, this occurred:

"THE COURT: Wait just a moment. Mr. Forte, you are disturbing the Court with your conversation. Let's have no more of it.

MR. FORTE: I am sorry, Your Honor."

Of course, this admonition in the presence of the jury was prejudicial. If this admonition was justified, counsel should have been called to the bench.

And at 783, we find:

"THE COURT: Now, wait a minute, Mr. Lowther.

Mr. Forte, if you feel that you need to consult with your counsel and would like a short recess to do so, I will do so.

MR. LAUGHLIN: Your Honor, if I may say, that's unnecessary and he is making no request. Your Honor indicated that Dr. Forte was

disturbing. If he was doing it, it was not his fault. I asked him a question.

THE COURT: Well, it may be.

MR. LAUGHLIN: And, Your Honor, he answered perhaps in too loud a tone. I suggested -- he was merely answering my question. There was no intent, contrary to what Your Honor said, there was no intent on the part of Dr. Forte to disturb the proceedings.

THE COURT: I did not say there was any intent, Mr. Laughlin.

MR. LAUGHLIN: Well, you said that he was disturbing the proceedings.

THE COURT: I did and he was, and some people have a natural tendency to talk loud, including myself, and they have trouble controlling their voice."

Of course this should not have been done in the presence of the jury.

At 788, a witness from the office of the United States Attorney was on the stand and questions were being asked as to letters being received in the office of the United States Attorney. Of course it was recognized that the case originally had been handled by Mr. Frederick G. Smithson, an upright and honorable Assistant United States Attorney who never stooped to recordings. This occurred:

"BY MR. LAUGHLIN:

Q All right. Now is Mr. Smithson still connected with your office?

A No sir; he is not.

Q When did he leave the service of the United States Attorney's Office?

THE COURT: Mr. Lowther, are you paying any attention?

MR. LOWTHER: No, I wasn't. I didn't see any reason to pay any attention to this, but I will object to it anyway, Your Honor.

THE COURT: I will sustain the objection.

MR. LAUGHLIN: Yes, Your Honor, I think the record should show that at Your Honor's suggestion Mr. Lowther objected and Your Honor sustained."

At Page 785, proceedings of April 23, 1964, the witness from the United States Attorney's office was questioned as follows:

"BY MR. LAUGHLIN:

Q All right, now I take it you know me?

A Yes, sir.

Q All right. Do you know Dr. Forte?

A No, sir.

Q You have never been to his office?

A No, sir.

Q You were not there in August of '63?

A No, sir."

At Page 897 of the transcript of proceedings of April 24, 1964, we find this:

"MR. LOWTHER: * * *. Yesterday afternoon, Miss Mary Walton of our office was on the stand, and she was asked a question by the defendant Laughlin, acting as counsel for the defendant Forte, about whether or not in August of last year Miss Walton had been to the office of Dr. Forte, and her answer to that question was, as I recall it, 'No. she didn't even know Dr. Forte.'

I think that counsel should assure the Court that there is a basis and proof will be offered that in fact that did occur. If not, I ask this Court to instruct the jury to disregard that question, and disregard the answer, * * *.

THE COURT: What have you got to say about it, Mr. Laughlin?

MR. LAUGHLIN: Your Honor, I don't think that we should be called upon to reply to that. When we asked the question, I can say this to you: We asked it in good faith.

THE COURT: Well, I will wait and see what develops. Of course, if they asked the question properly then they should have such information. If they don't it is despicable to have asked such a question without anything to back it up, or indicate that they had something.

However, I don't think that the thing should be dignified before the jury by even mentioning it to them."

Continuing at 898 and 899, this occurred:

"MR. LAUGHLIN: Your Honor has used the term 'despicable'. I want you to say -- I want to say this to you insofar as Dr. Forte is concerned in his litigation, there have been many, many, many things that have been despicable.

THE COURT: Could be."*/

And at Page 923 of the transcript of proceedings of April 24, 1964 the court made this gratuitous statement:

"THE COURT: Mr. Lowther, if it will inspire you any, when we get all of these telephone things in we will go home.

MR. LOWTHER: That gives me much inspiration, I will say right now, Your Honor."

*/ This was wholly improper both on the part of the Assistant United States Attorney and on the part of the trial judge. We, of course, did not intend by any means to imply that Miss Walton was at Dr. Forte's office for any illegal or improper purpose. However, we were prepared to show, had we put on evidence in our own behalf, that she was there at the request of Mr. Sullivan, Mr. Hannon and Mr. Lowther to take certain stenographic notes on behalf of Mr. Sullivan and when the question was asked it was asked in the utmost good faith.

VI When as a result of misconduct the Grand Jury becomes a pawn in the hands of Government presecutors and thereby becomes biased, the indictment should be dismissed.

We believe we can show that the indictment in this cause should be dismissed. Our contention in this respect has to do with the bias of the Grand Jury. We have not overlooked the language of the Supreme Court opinion in Costello v. United States, 350 U.S. 365, 76 S.Ct. 406. However, in our judgment the language used by the Supreme Court in the Costello case assumed that the Grand Jury was not biased. Therefore, it can well be argued that if in the Costello case the Supreme Court had before it the contention that the Grand Jury was biased and there was evidence to support that, the result would have been different.

In the instant case we believe there is ample evidence indicating bias on the part of the Grand Jury. A motion was filed in the lower court to dismiss on the ground of Grand Jury bias.

As a further instance of Grand Jury bias, we refer to Page 38 of the Grand Jury testimony of Joyce Johnson (March 26, 1963). Joyce Johnson was also a target of investigation and her case is now pending in this court (No. 18,578 Joyce Johnson v. United States). Her case was before the Grand Jury returning indictments against appellants in this case. After she had testified extensively and had invoked the protection of the Fifth Amendment upon several occasions this occurred:

"Deputy Foreman: Do you propose to write a letter to the Director of Personnel of the Navy Department advising him of this refusal to testify.

Mr. Sullivan: I had no plan to do it at present."

To further illustrate that we were dealing a a biased Grand Jury

and demonstrating that it was under the sway of Mr. Sullivan and Officer Wallace, we find that while the Grand Jury was waiting for Mrs. Johnson to return from lunch (see transcript testimony Joyce Johnson March 13, 1963 at page 96), Mr. Sullivan played for the Grand Jury a tape recording of a telephone conversation between Bernice Gross and appelland Laughlin.

We have already dealt with the matter of unlawful recordings and in another part of this brief we are dealing with the participation of Sgt. Wallace and the obvious desire on the part of the United States Attorney's office to shield Wallace and to cover up our contentions as to the bribery of Wallace. However, in stressing our contentions as to a biased Grand Jury, we would ask the Court to consider the matter of the unlawful recordings in this connection as well as in our first point. Of course the recordings obtained in violation of the Federal Communications Act were played to the jury and this was after the witness had been browbeaten and threatened in the office of the United States Attorney. In our judgment these factors alone would have justified the dismissal of the indictment. However, we now set forth matters which in our opinion clearly demonstrate that the Grand Jury was biased and that the Assistant United States Attorney was guilty of serious misconduct. Under another heading we are making a point as to the misconduct of the United States Attorney's office and the reasons why they were trying to protect Sergeant Wallace. When the motion for dismissal on account of the Grand Jury bias was brought to the attention of the trial judge in this case, the court said (Page 24, Transcript of Proceedings, April 14, 1964):

"THE COURT: * * * you say 'We make reference to certain Grand Jury testimony to show that the Grand Jury was inflamed against both defendants in this cause.'?"

Appellant Laughlin responded:

"MR. LAUGHLIN: * * * I will call your attention to this. Mr. Sullivan is saying to the Grand Jury 'and as a result of certain information which came to the attention of the United States Attorney for (sic) Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin, that Jean Smith of the Baltimore area had a record or a reputation as a call girl and prostitute.'"

It is very significant in this respect that the witness utilized for this purpose was none other than Samuel E. Wallace who was himself, as we have previously stated, a target of investigation. Wallace responded to the question as follows:

"ANSWER: I did check it out."

A juror responded (this appears at Page 28 the Grand Jury testimony and in the instant case is referred to at Page 24, Tr. of Proceedings, April 14, 1964):

"A JUROR: Mr. Laughlin seems to be throwing around an awful lot of accusations."

And then referring to Page 29 of the Grand Jury testimony we find this:

"JUROR: This man Laughlin has made a charge."

At Page 25, Transcript of Proceedings, April 14, 1964, appellant Laughlin referring to Grand Jury testimony said this:

"At Page 30, the following statement was made by a juror:

'We had this charge interjected into this case against this Hill woman. The same charge. Now, I don't know anything about that because--(pausing)--I don't know what they are going to try to dig up on her. Mrs. Johnson came in here and you know what she said, and I think in the future on these witnesses we have had an awful lot of countercharges here and a lot of people make countercharges when they are trying to cover up something against themselves, and I think we should be awfully careful before we get into the record any assertions or any innuendoes because I think this Grand Jury wants to hold this testimony on a little higher standard than * * * Jim Laughlin's concept of trying a law case. That's all I have to say'."

This, of course, is significant. The Grand Jury apparently did not know the appellant Laughlin. Probably they knew nothing of his manner of trying cases. It will be seen, therefore, that the manner in which Wallace was placed on the stand would inflame the Grand Jury against the appellant Laughlin.

We have always understood that a prosecuting attorney is not supposed to reveal the source of his information. In connection with this matter, the appellant Laughlin in the court below, outside the hearing of the jury, took the stand and testified as to his version of the matter. See Pages 28 to 40, Transcript of Proceedings, April 14, 1964. The testimony set forth in substance this: (Tr. 28)

"MR. LAUGHLIN: * * * After that trial Mr. Sullivan called me on numerous occasions as to what information I may have, first, as to the alleged offer of a bribe as to Dr. Forte, also by Detective Wallace, also as to what I may know about any approach that may have been made to Mrs. Smith or any other witnesses."

And appellant Laughlin further testified: (Tr. 29)

"Mr. Sullivan called me and he said, 'I have information' -- 'Information has come to me which I haven't been able to verify, that Jean Smith was at one time a call girl. Do you have anything to base that on?'

"My reply was that I did not know Jean Smith, I never saw her until the day that -- the day she had appeared in court in the courtroom of Judge Tamm. I had never seen her prior to that time, but that I had made a request for a credit report on Jean Smith. She lived in some place in Maryland, Catonsville, or some small community not far from Baltimore.

"At no time did I represent to Mr. Sullivan that I had information to the effect that she was a callgirl. It was he who made the statement."

And appellant Laughlin further testified:

"And then I said, 'Well, you have the resources at your disposal which I don't have. You have resources of the Police Department, you have resources of the Federal Bureau of Investigation, and I would ask you to check into it'."

It is significant that no testimony was offered in the court below to contradict the testimony of appellant Laughlin.

Therefore, we can well realize that a prosecuting attorney who has charge of a Grand Jury and whose influence with that Grand Jury is great, could easily inflame a Grand Jury in a situation of this kind. It was apparent he was endeavoring at all costs to shield and protect Detective Wallace and then he very cunningly and we say dishonorably used the process of the Grand Jury to bring Wallace before the Grand Jury and to place Wallace in a favorable light by giving the impression that appellant Laughlin had not only given to Mr. Sullivan false information but information very detrimental to the character of the complaining witness.

We say in this respect, and a reading of the whole record in the case will clearly show, that the Grand Jury could not deal fairly and justly and impartially with appellant Laughlin.

We will refer again to the testimony of Wallace before the Grand Jury on March 26, 1963. He was asked this question (Page 27):

"BY MR. SULLIVAN:

Q Would you please tell the Grand Jury briefly what you did and the results of that check.

A I called Lieutenant Newcomer of the Baltimore State Police and he went to Baltimore, checked the Criminal Record Division there. He found that she had been charged, not in Baltimore, but in the County for drunken and disorderly on one occasion; * * * as far as her husband goes, he is clean. We have his car. And that's about it."

This is very peculiar because it was not necessary to use Wallace for this purpose. The orderly thing would have been to use one of the policemen from Baltimore. Of course he had a reason for using Wallace. After Wallace had made the statement: "He is clean. We have his car. That's about it", Mr. Sullivan said: "Thank you, Sergeant Wallace."

Then a juror said:

"Mr. Laughlin seems to be throwing around an awful lot of accusations.

"Did you make any better check than this? Now, he had made an accusation here that she is a call-girl."

Then the following occurred:

"MR. WALLACE: That's right.

JUROR: So we have a charge that she was drunk and disorderly.

MR. WALLACE: That's right."

Then a juror said:

"JUROR: That can mean almost anything. It might be a policeman doesn't like the way you're talking, if it happens to be that type of policeman. An incidentally, this man who checked it out there, has his name been mentioned in this before?"

At this point Mr. Sullivan replied (Page 29, Grand Jury Proceedings, March 26 1963, with Detective Wallace still on the stand):

"MR. SULLIVAN: He had been mentioned in the unit whos (sic) checked on the inter-state abortion activity, Wallace, the officer from Virginia and the officer from Detroit and the captain there."

Then we find the following occurred:

"JUROR: We can't actually know for sure that this is the same Mrs. Smith, do we:

THE WITNESS: Apparently, it is from the description.

JUROR: Let's get away from this 'apparently,' Sergeant.

THE WITNESS: All right.

JUROR: This man Laughlin has made a charge.

THE WITNESS: That's right.

JUROR: Now, the only thing we have come up with is that we have a drunken charge.

THE WITNESS; Drunk and disorderly.

JUROR: Drunk and disorderly.

THE WITNESS: Yes.

JUROR: We Don't even know it's the same person for sure.

THE WITNESS: That's right."

And then Mr. Sullivan came to the rescue of Wallace and said this is the Grand Jury room (Page 30, Grand Jury proceedings, March 26, 1963):

"MR. SULLIVAN: May I ask you, Sergeant Wallace, to contact Mr. Newcomer and find out the background on that drunk and disorderly charge and also ascertain from Mrs. Smith whether, in fact, she has ever been arrested. You can do that either directly through yourself -- I think that would be better perhaps."

It was after this, then, that a juror made the statement about holding "this testimony on a little higher standard than Jim Laughlin's concept of trying a law case".

At Page 31 of the same proceeding before the Grand Jury on March 26, 1963 we find the following:

"DEPUTY FOREMAN: You see our position, Sergeant. We have a responsible source; we have a very common name; and we've got a charge that could mean a lot, or it could mean nothing. So we think the record should be very clear on this.

A JUROR: Didn't Jean Smith mention something about some hotel or something?

MR. SULLIVAN: I believe the testimony that you might be thinking of is that of Bernice Gross, keeping a material witness in a hotel. And according to Mr. Laughlin's testimony, at that point, when Gross was supposed to keep the witness in the hotel, they left the hotel room and went around the block, and as a result of that activity, Mrs. Gross left the force.

That's my recollection. I don't know if there is anything in addition to that."

This, in our judgment, was malicious and willful on the part of Mr. Sullivan. As to the circumstances of Mrs. Gross' dismissal from the police force, the complete records were available to Mr. Sullivan. Before she was dismissed, there was a full and complete hearing and there is a stenographic

transcript of the proceedings. She refused to take the stand and offered no testimony in her behalf. Therefore, we can assume that Mr. Sullivan read this stenographic transcript, was acquainted with the circumstances of her dismissal and there was no reason for him to give the Grand Jury what he said was appellant Laughlin's version of the incident.

It is significant that at Pages 31 and 32 of the same Grand Jury testimony we find Mr. Wallace returning to the Grand Jury room a few minutes after being excused and making the following statement:

"THE WITNESS (Detective Wallace): I called Mrs. Smith, I asked her the circumstances of the arrest. She said she is the one that * * *. She and her husband were having a family argument, and the neighbors called the police. And that's it."

And then a juror made this statement (Page 32):

"A JUROR: So it's a long way from being a call-girl."

And Detective Wallace added:

"THE WITNESS: A long, long way."

Therefore, it will be seen the mischief that was done in this instance and we contend that it was a malicious and willful abuse of Grand Jury process. In the first place Wallace was taking Mrs. Smith's version of the circumstances of the arrest and stating that as a fact. If he wanted to be truthful and upright, he would get the records of the arrest and the police report of the incident.

All of this, of course, indicates that the Grand Jury was inflamed against the appellant Laughlin and on that account, biased.

This is further fortified by a reference to the proceedings in the office of Assistant United States Attorney Hannon where Bernice Gross was interrogated by Hannon and Sullivan for some two or three hours after she had given testimony unsatisfactory to Mr. Sullivan before the Grand Jury. At Page 8 (Interrogation

of Mrs. Gross on March 1, 1963 in U. S. Attorney's Office), we find this:

"MR. SULLIVAN: You didn't get it when Laughlin complained he was disappointed.

MRS. GROSS: No, Laughlin never complained to me."

And at Page 9, Mr. Sullivan said this to Mrs. Gross:

"MRS. SULLIVAN: I want to level with you. If you tell the truth about what happened you're not going to get in trouble because I'm going to tell the Grand Jury without you there is no chance of our making the case on the big fish; there is no possibility -- there is a very small possibility, but without you we can't do it."

And it is interesting to note in this connection that the investigation as to Wallace was not a good faith investigation. Mr. Sullivan, at Page 9, said this to Mrs. Gross (Interrogation of Mrs. Bernice Gross, Room 3439, U.S. Attorney's Office, U. S. Court House, March 1, 1963):

"MR. SULLIVAN: The accusation was made against Mr. Wallace; it was a lie; Forte made it up; we know how the story got made up."

The above statement is quite significant when we read the answer made by Mr. Sullivan in this cause, that he doesn't know to this day whether the accusation against Wallace was true or false (Page 145, Tr. of Proceedings, April 15, 1964).

At Page 10, Mr. Sullivan said (Interrogation of Mrs. Gross, Room 3439, U. S. Attorney's Office, March 1, 1963):

"MR. SULLIVAN: We have something. I'm not going to tell you if you decide to go back to Laughlin and that crowd."

And then at that point Mr. Hannon made this statement to Mrs. Gross (Page 14):

"MR. HANNON: I have known Sam Wallace for seven years, for what it is worth to you. He is a straight police officer; always has been"

At Page 25 (Interrogation of Mrs. Gross on March 1, 1963 in U. S. Attorney's Office), the following occurred:

"MR. SULLIVAN: Jean said something about Laughlin. Jimmy Laughlin, the lawyer, saying he was disappointed in the fact that Jean did come forward and testify and for that reason you didn't get anything the last time.

MRS. GROSS: I don't know. My dealings were with the old man.

MR. SULLIVAN: Didn't Laughlin call since the trial was over, or any other lawyer?

MRS. GROSS: No, no."

Further, at Page 40, the following occurred:

"MR. SULLIVAN: Did Laughlin know about the money passing hands?

MRS. GROSS: I don't know whether he knew -- I can't say whether he knew or not because I never got anything from him.

MR. SULLIVAN: Did Forte ever say Laughlin was in on it?

MRS. GROSS: No."

That Judge Youngdahl was surprised at the nature of the proceedings before the Grand Jury can be shown from his remarks as follows (Page 310, Oct. 1963, Criminal No. 599-63, United States v. Laughlin):

"* * * but I will admit to you, frankly, I was shocked when I read the testimony for the first time of the Deputy Foreman of the Grand Jury and of Mr. Sullivan."

And again at Page 310 Judge Youngdahl said:

"* * * but fortified by these two statements which shocked me, as I read them for the first time, because it clearly indicated then to me that the Government was up against a serious obstacle on this matter of consent, * * *."

In this case Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, has application. The Court, speaking through Justice Clark, was referring to the matter of self-incrimination in Federal grand jury investigations and said this:

"The signal increase in such litigation emphasizes the continuing necessity that prosecutors and courts alike be 'alert to repress' any abuses of the investigatory power invoked, bearing in mind that while grand juries 'may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire * * *

whether a crime cognizable by the court has been committed', Hale v. Henkel, 201 U.S. 43, 65, 26 S. Ct. 370, 375, 50 L.Ed. 652, yet 'the most valuable function of the grand jury (has been) not only to examine into the commission of crimes, but to stand between the prosecutory and the accused,' * * *."

We believe the best expression on this matter is found in the old case of United States v. Farrington, 5 Fed. 343. While this was decided many, many years ago, an examination will show that it is still being cited as authority. A question was raised in that case as to the unfairness of the methods used by the grand jury. The Farrington case said this:

"It would be difficult to find a case which more forcibly illustrates the good sense and justice of the rule which permits a free disclosure than the present. It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probably that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mess of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter."

As to the matter of improper use of grand jury process we would call the Court's attention to United States v. Digrazia, 213 F. Supp. 232, United States District Court, Northern District of Illinois. In the Digrazia case the District Judge quashed an indictment where the Assistant United States Attorney asked the defendant clearly prejudicial questions which could only be calculated to discredit and impugn her in the eyes of grand jurors, although other evidence might have warranted an indictment and defendant gave no incriminating evidence. The Court said:

"The Grand Jury exists as an integral part of Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the Government or private persons. Cf. United States v. Wells, 163 Fed. 313."

And the opinion in the Digrazia case continues:

"In this regard it is well to remember Mr. Justice Brandeis' admonition that 'the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.' Olmstead v. United States, 277 U.S. 438."

And the opinion of the Court continued in the Digrazia case:

"it is the duty of the prosecutor presenting a case to a Grand Jury not to inflame or otherwise improperly influence the jurors against any person. Even the presence of the prosecutor while the jurors are deliberating their action, though he say nothing, may be grounds for quashing the indictment. United States v. Wells, 163 Fed. 313."

Since the Court referred to United States v. Wells, 163 Fed. 313, an examination of that case reveals a carefully reasoned opinion by the District Court Judge and in the course of his opinion he referred to Wharton Criminal Pleading and Practice, 9th Edition, which reads as follows:

"It is proper in this connection to keep in mind the fact * * * that the only valid basis on which the institution of grand juries rest is that they are an independent and impartial tribunal between the prosecution and the accused; and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality."

Perhaps the most recent pronouncement on this very important principle is found in Wood. v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, where Chief Justice Warren, speaking for the Court said:

"Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

In view of what has been said, in our judgment the court below was in error in not dismissing the indictment and we would ask in this case that the order of this Court direct that the indictment be dismissed for the reasons stated.

VII. When it is shown that a Grand Jury is being used for discovery proceedings in order to permit the Government prosecutors to prepare for trial on an indictment presented by a previous Grand Jury, the indictment in the present cause should be dismissed.

We believe it is apparent that there was an abuse of Grand Jury process. We have already shown that Judge Youngdahl in United States v. Laughlin, Criminal Case No. 599-63, has ruled that the tape recordings were obtained in violation of the Federal Communications Act. Judge Curran later dismissed the indictment. The Government noted an appeal and later abandoned the appeal. The opportunity was presented to have appellate review of Judge Curran's ruling. It appears that the appeal was not filed in good faith but apparently was done with the intent to circumvent the panel of judges assigned to the Criminal Courts for the months of January, February and March of 1964.

Although the witness Bernice Gross had appeared before the Grand Jury on 2 occasions March 1, 1963 (morning and afternoon) she also appeared before the Grand Jury on March 18, 1963. She was extensively grilled in the office of Joseph Hannon on March 1, 1963 after her first appearance before the Grand Jury and had made responses not satisfactory to Mr. Hannon and Mr. Sullivan. In addition, she had conferred either face to face or over the telephone with Mr. Sullivan in excess of 100 times. She was also in constant touch with Officer Wallace who was himself being investigated.

The United States Attorney knew that the trial was set for April 9, 1964. Mrs. Gross was brought before a different Grand Jury in March 1964 (see testimony Bernice Gross before Grand Jury March 19, 1964). She was asked virtually the same questions she had been previously asked. It was only by accident that we discovered that she had appeared in March 1964. We ascertained this

during the trial in this cause. Accordingly, we filed a motion for dismissal. (See transcript 545 and 656, April 22, 1964). We asked for a complete hearing based on United States v. Pack, 150 FS 262. That case had to do with the use of a Grand Jury for discovery proceedings to be used as evidence based on indictments by a prior Grand Jury.

The trial judge seemed to make light of our motion (Transcript 546):

"Well, who was being investigated under the perjury statute, Mr. Laughlin."

Reference had been made to Dardi v. United States, 330 F(2) 316. When attempts were made to question witness Gross about her appearance on March 19, 1964, objections were sustained. (Transcript 550). When we asked for a full and complete hearing as was given in United States v. Dardi, the Court said (Transcript 583):

" * * * you asked for a full and complete hearing, Mr. Laughlin, which would further delay a trial already delayed beyond all endurance, almost....."

and the Court said (Transcript 584):

"...it would seem to me....what they are doing is investigating a possible charge of perjury against you, does that not appear to be true?"

When the Court was told that the Government had noted an appeal and had abandoned the appeal the Court said (Transcript 584 - 585):

"That wouldn't stop them from reindicting you, would it?"

The Court would only permit the questioning of Sullivan and denied a full scale hearing. It will be seen even as to the questioning of Sullivan that the questioning was unduly restricted. (Transcript 588 to 605). The Court then made a finding that the Grand Jury was not used for discovery purposes (Transcript 605 - 606). It will be seen that in United States v. Dardi, supra, a full scale hearing was allowed.

In the instant case we say there was a wilful abuse of Grand Jury process and justified the dismissal of the indictment.

VIII. The trial judge wrongfully excluded evidence showing misconduct on the part of the United States Attorney's office and on the part of Officer Wallace in refusing to permit the play of recordings reflecting conversations between Sullivan and Gross, and Gross and Wallace.

There were many telephone conversations recorded between Sullivan and Gross and Wallace and Gross. It was our contention that since the first recordings were admitted we should have had the right to have these recordings played before the jury. The trial judge permitted the recordings to be played outside the jury but he denied to appellants the right to have the jury hear the recordings. The contents of the recordings are found in the stenographic transcript of April 21, 1964 and we make reference to Pages 363 to 473. It will be seen from the reading of these transcripts that the United States Attorney's office was permitting Wallace to play a major role and since we contend that the prosecution was not brought in good faith we should have had the right to get before the jury the conversations between Sullivan and Gross and Wallace and Gross. As a matter of fact a reading of the transcripts will show that both Gross and Sullivan were on a first-name basis and Gross and Wallace were on a first-name basis. We quite realize that it would be an entirely different situation had the court not received in evidence the recordings between Gross and Laughlin.

IX. The court disregarded the rule of completeness.

We have already stated that when the grand jury was empaneled it was to investigate not only alleged "approaches" to the complaining witness Jean Smith but also the alleged bribery of one Samuel E. Wallace of the Police Department. It was assumed that it would be a good faith inquiry. However we find that Wallace was virtually permitted to take over the investigation, to interview witnesses, to arrange for recordings and in fact act as an agent for the United States Attorney's office. In this connection we ask the Court to read the following pages of the transcript:

51, 195, 196, 144, 152, 153, 188, 206, 200, 211, 212, 217,
358, 359, 3631, 488 to 511, 569, 564 to 578, 728, 730, 759, 760,
896, 954.

It will be seen that the trial judge shut off virtually all reference to Wallace. We contend that it was entirely proper to show that various persons had talked to the government witnesses. We contend also it was proper to bring out Wallace's true role in the case. Of course he had a deep personal interest in the outcome of the case.

We believe the matter is best set forth in Jones v. State, 194 SW 117.

"In a prosecution for violation of the local option law the accused should be permitted to prove a conspiracy between the state's witnesses and officials, and that such witnesses, to escape punishment for crimes for which they were then in jail, fabricated testimony against the accused."

In connection with the Wallace matter and the great solicitude shown him by the United States Attorney's office we desire to refer to page 270 of the transcript (April 15, 1964) with Mr. Sullivan testifying we find this:

"Mr. Sullivan....That was one of the factors. Mrs. Birge had stated too, that Wallace had offered her money for perjured testimony and that was one of the factors...."

And with Jean Smith testifying (Transcript 75 and 75 Testimony of Jean Smith

April 16, 1964 Reporter Henderson) we find this:

"Mr. Laughlin...Now was there not, a time or times that you talked to Mrs. Gross or she talked to you about Sergeant Wallace; is that right?

Mrs. Smith: Oh yes, she made quite a few remarks.

Mr. Laughlin: Did she ever tell you that Wallace was paid off?

Mrs. Smith: Yes.

Mr. Laughlin: ... on how many occasions?

Mrs. Smith: Quite a few.

Mr. Laughlin: .. and paid off in Baltimore or here or where..

Mrs. Smith: She didn't say."

The above, of course, is important to show that Wallace had a deep personal interest in the outcome of the case and it will be seen that his real role in the case was kept from the jury. It is our contention that under Jones v. State, supra, it was error to exclude such inquiry.

The matter of the rule of completeness is set forth in United States v. Corrigan, 168 F.2d 641. It is also well stated in United States v. Apuzzo, 245 F.2d 416, where we find this:

"It is now common place that the rules of evidence have tended evermore freely in the direction of admission of all relevant testimony in the light of modern experience that the truth is more often found by full revelation than by concealment. Hence we have the modern principle, stated in the modern code of evidence, and now embodied in Uniform Rules of Evidence U.R.E. 7: 'General abolition * * * exclusionary rules accept as otherwise provided in these rules *** (f) all relevant evidence is admissible'. And we have often admonished our trial judges to err, if at all, on the side of the admission, rather than the exclusion of evidence. A trial judge must rule on admissibility quickly and almost by instinct; his instinct ought to be to bring out the truth, rather than to permit a party to cover up a part of his case. It is true that there are certain special privileges, such as against self incrimination, which rest on a different background; but outside of these, the search for the truth should be the lodestone."

See also Wigmore on Evidence, Third Edition, Sections 2094, 2104, 2113, 2119 and 2120:

"To look at a part (of an utterance) alone would be to obtain a false notion of the thought * * *. One part cannot be separated and taken by itself without doing injustice by producing misrepresentation; and again 'possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was'; consideration of the whole is needed 'to avoid the danger of mistaking the effect of a fragment'.

"The effect of opening the door has been well and tersely defined in Hayden v. Hordley, 94 Vt. 345; 111A. 343, wherein the court said 'the rule is protective merely. It goes only so far as is necessary to shield a party from adverse inferences, and only allows an explanation or rebuttal of the evidence received'."

X. The court erred in denying appellants' tendered instructions.

The Court file will reflect the very many tendered instructions. In our view they correctly stated the applicable principles of law. Since there are so many points involved in this appeal and having in mind the requirements as to limitation of space, we are unable to set forth each individual instruction. We contend that it was error to deny any of them. As a matter of fact it will be seen that practically all were denied.

XI. The trial court was in error in its charge to the jury on the law regarding conspiracy and post-conspiracy declarations.

In the court charge, this was stated:

"The Court admitted in evidence certain tape recordings of alleged telephone calls between Bernice Gross and defendant Laughlin on March 1, March 13 and March 18, 1963, the same covering a period of time after the alleged conspiracy ended.

"I caution you again that this evidence, being Government's Exhibits 11, 12 and 13, is not admissible and may not be considered by you in any way against the defendant Forte. This evidence may be considered against the defendant Laughlin only, and then only for the purpose of connecting Laughlin with the conspiracy if you should find that one had been entered into.

"Further, I instruct you that this particular evidence is not to be considered on the question of whether or not the conspiracy existed but only as bearing on the question of whether the defendant Laughlin was a part of any conspiracy that may have previously existed as alleged in the indictment if you find from other evidence adduced in the case that such conspiracy in fact existed."

This does not correctly state the law. We contend that the recordings were not admissible at all and if there was any theory of admissibility they could only be received against the co-conspirator. We also desire to point out that even assuming they were otherwise admissible, there was no independent evidence of the existence of a conspiracy.

CONCLUSION

This case presents a sordid episode in law enforcement. The record shows that a police officer had been accused of attempted bribery and a grand jury was sworn to inquire into it. The grand jury was also to investigate alleged "approaches" to a government witness. The prosecuting officers then permitted the accused officer to take over the investigation and to interview witnesses and to familiarize himself with the grand jury by allowing the accused officer to testify on wholly unrelated matters. Of course with the attitude of the United States Attorney's office Wallace was permitted to escape unscathed. It is our view that the United States Attorney's office should be zealous to seek the truth and it should be the aim and desire of that office to see that the jury gets the benefit of all possible evidence that may throw any light on issues involved. If there is proper leadership that will always happen. Of course if proper leadership is lacking then the ends of justice will be thwarted. We believe the matter is well state in U. S. v. Zborowski, 271 Fed(2)661:

"The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried; in the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction."

Of course we have never been able to understand why the United States Attorney's office did not make an honest bona fide effort to make a full inquiry into the accusations against Officer Wallace - particularly when they had so much material at their disposal. Be that as it may - if they desired to shield Wallace and to ignore the allegations made against him - we must inquire why they permitted him to act as an agent for Mr. Sullivan and Mr. Hannon to permit him to virtually take over the investigation. In fact they permitted him to

investigate himself. We know of no rule of law, ancient, medieval or modern, that permits this. In Griffin v. United States, 87 US Appeals DC 172 this Court said:

"However the case emphasizes the necessity of the disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense."

In the instant case that is what the prosecution did not do. We doubt whether in the annals of the District Court (or its predecessor the Supreme Court of the District of Columbia) there has been such a miscarriage of justice and such wilful and callous disregard of the rights of an accused as was shown in this case. It has been a source of regret that we have not been able to pinpoint and particularize every facet of this case. The limitation of space as required by the rules prevents this.

We do however desire to emphasize that we stress the following:

Use of the recordings. These had no place in the trial inasmuch as Judge Youngdahl and Judge Curran had already ruled that these recordings were obtained in violation of the Federal Communications Act. There was of course an utter disregard by the trial judge in this case of the decisions of Judge Youngdahl and Judge Curran.

The failure of the trial judge to disqualify himself when a legally sufficient affidavit of bias and prejudice was filed.

The bias of the grand jury necessitating dismissal of the indictment.

The failure of the trial judge to permit the appellants to play the recordings showing improper conversations between Sullivan and Wallace and Wallace and Gross.

The failure of the trial judge to permit us to explore into the activities of Wallace who had been accused of bribery.

The error on the part of the trial judge to admitting post-conspiracy declarations of Bernice Gross.

The error of the trial judge in refusing us the right to place Wallace in his proper setting.

The error on the part of the trial judge in preventing us from fully showing the misconduct on the part of the United States Attorney's Office.

The error of the trial judge in denying requests for instructions.

The error of the trial judge in his charge to the jury.

The error on the part of the trial judge in permitting the Assistant United States Attorney to play certain tape recordings in final argument.

The overall bias, hostility and prejudice of the trial judge.

We desire to say finally that a careful reading of the record in this case will fully reveal that the trial in this case represented a departure from the well accepted and ordinary course of judicial procedure and in fact it will show that the trial was a farce. We must not overlook the remarks of Justice Murphy dissenting in Fisher v. Pace, 336 US 155:

"If the judge intends to be unfair the trial will be a farce no matter how many detailed rules we provide for him"

It is a pleasant and sobering feeling to be tried before an honest and upright judge - one without malice and hostility. Unfortunately on the other hand we sometimes run head-on into the other kind as Justice Murphy recognized in Fisher v. Pace, supra. When a trial judge and an Assistant United States Attorney become friendly confederates and the truth is suppressed we have an unwholesome situation. We must never overlook the words of Justice Brandeis in Olmstead v. United States, 277 U.S.438:


"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasures and satisfactions of life are to be found in material things..."

And Justice Brandeis also said:

"Our government is the potent, the omnipresent teacher for good or for ill. It teaches the whole people by its example... if the Government becomes a law-breaker it breeds contempt for law...To declare that in the administration of the criminal law the end justifies the means...to declare that the government may

commit crimes...would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

We say therefore that the judgment below should be reversed and the indictment dismissed.


James J. Laughlin
Counsel for Appellant Forte

William J. Garber
Counsel for Appellant Laughlin

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,711

JAMES J. LAUGHLIN,

Appellant,

v.

UNITED STATES OF AMERICA,

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ALLAN U. FORTE,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

DAVID C. ACHESON,
United States Attorney.

FILED OCT 13 1964

Nathan J. Paulson
CLERK

FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
ANTHONY A. LAPHAM,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Whether the trial judge erred in failing to disqualify himself on the basis of an affidavit which (a) was filed two days after the case had been sent to him for trial by an affiant who had been before him on both days seeking affirmative relief; (b) showed on its face that the facts on which it was based had been known to affiant for years; and (c) was directly traceable to adverse rulings on affiant's motions?

(2) Whether the court erred, over objections based on the Federal Communications Act, in admitting the contents of four telephone conversations between a witness and the accused where (a) these conversations were overheard on an extension phone and recorded by means of an induction coil apparatus; and (b) there was substantial evidence to support the finding that the telephone calls were made, overheard, and recorded with the consent of the witness?

(3) Whether an estoppel by judgment as to the question of consent by the witness in the matter of the tape recordings arose from (a) an order declaring a mistrial in another case, or (b) an order granting a motion to dismiss the indictment in another case?

(4) Whether the trial court erred in failing to exclude the live testimony of one co-conspirator against the others, and whether proper limiting instructions were given concerning post-conspiracy declarations by a co-conspirator?

(5) Whether the court erred in denying motions to dismiss the indictment based on alleged grand jury bias and alleged abuse of grand jury process?

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,711

JAMES J. LAUGHLIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 18,712

ALLAN U. FORTE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A four-count indictment filed on July 2, 1963, charged appellants as follows: (1) Count One charged that appellants, in violation of 18 U.S.C. §371, unlawfully and knowingly conspired with each other and with one Bernice Gross, a co-conspirator but not named as a defendant, to defraud the United States and to commit other offenses against the United States, to wit, violations of 18 U.S.C. §1503 (Influencing Witness), 18 U.S.C. §1621

(Perjury), and 18 U.S.C. §1622 (Subornation of Perjury); that said conspiracy related to proceedings preliminary to trial in Criminal Case No. 741-61, wherein Allan U. Forte was charged with violations of the abortion statute; that said conspiracy commenced on or about September 1, 1961, and continued until about February 20, 1963, the date of the return of the verdict in Criminal Case No. 741-61; that it was part of said conspiracy that appellants, well knowing that one Jean Smith would be a material witness, did corruptly endeavor to influence Jean Smith by persuading her to induce the Government to abandon prosecution, or if prosecution were not abandoned then to absent herself from the proceedings, or if she did not absent herself then to testify falsely; that it was part of the conspiracy to obstruct the administration of justice in the trial of Criminal Case 741-61 in the manner aforesaid; that the co-conspirators committed, among others, seventy-one enumerated overt acts in furtherance of the conspiracy. (2) Count Two charged Forte with the substantive offense (18 U.S.C. §1503) of corruptly endeavoring to influence the witness Jean Smith. (3) Count Three, subsequently dismissed on motion of the United States, charged appellant Forte with the same substantive offense as to one Dorothy Birge. (4) Count Four charged appellant Laughlin with the same substantive offense as to Jean Smith.

Motions to dismiss the indictment were denied on November 13, 1963, United States v. Laughlin, 223 F.Supp. 623 (D.D.C. 1963), and again on April 15, 1964. The trial judge having declined to disqualify himself on the basis of an affidavit of bias and prejudice filed by appellant Laughlin on April 16, 1964,^{1/} trial before a jury commenced on that day.

^{1/} The relevant facts concerning the affidavit of bias and prejudice filed by appellant Laughlin and the judge's ruling thereon are set forth in Argument I, .

On April 29 the jury returned a verdict against appellants on the conspiracy count and against each appellant on the substantive count involving Jean Smith. By judgment and commitment filed June 19, 1964, each appellant was fined \$10,000 and sentenced to a term of imprisonment of from twenty (20) months to five (5) years on the conspiracy count; each appellant was also sentenced to a term of imprisonment of from twenty (20) months to five (5) years on the substantive count, those sentences to run concurrently with the sentences imposed on the conspiracy count. These appeals, consolidated by order of this Court dated July 24, 1964, followed.

Background

In Criminal No. 741-61, United States v. Allan U. Forte, Forte was charged in two counts with having procured and having attempted to procure an abortion on Jean Smith and in two counts with having procured and having attempted to procure an abortion on Dorothy Birge. The indictment was filed on September 11, 1961. On November 17, 1961, on motion of the defendant, the two counts relating to the alleged abortion on Smith were severed from the two counts relating to the alleged abortion on Birge. Laughlin entered his appearance as attorney for Forte on April 20, 1962.^{2/} On February 12, 1963, trial commenced on the two counts relating to the alleged abortion on Jean Smith. Smith testified as a witness for the prosecution. The trial ended in acquittal on February 20, 1963.

Following termination of the trial in Criminal No. 741-61, an investigation was conducted by the January 1963 Grand Jury into all evidence

^{2/} The District Court file, as well as the transcript of proceedings, in Criminal No. 741-61 are part of the record on appeal. Laughlin's praecipe, dated April 20, 1962, may be found in the file.

of any obstruction of justice in the case.^{3/} That investigation resulted in several indictments. One of those indictments charged that Laughlin had committed perjury when, in testimony before the Grand Jury on March 6, 1963, he denied that he had ever met or spoken on the telephone with one Bernice Gross. Trial upon that indictment (Criminal No. 599-63) came on before Judge Youngdahl on October 1, 1963, and ended in a mistrial on October 8, 1963.^{4/} The reasons for the declaration of a mistrial were set forth by Judge Youngdahl in a memorandum opinion. United States v. Laughlin, 222 F.Supp. 264 (D.D.C. 1963). Subsequently the indictment in Criminal No. 599-63 was dismissed by Judge Curran. United States v. Laughlin, 223 F.Supp. 623 (D.D.C. 1963). At the same time that Judge Curran granted Laughlin's motion to dismiss in Criminal No. 599-63, he denied appellant Laughlin's motion to dismiss the indictment in Criminal No. 600-63. The latter indictment, another of those returned by the January 1963 Grand Jury, charged both appellants with the offenses of which they were later adjudged guilty in the proceedings now before this Court for review.

^{3/} The origins of the investigation are traceable to the trial in 741-61. While testifying in his own behalf, Forte had charged that the arresting officer in the case, Detective Samuel Wallace, had offered to fix the matter and to protect his (Forte's) operations in the abortion trade for \$250 a month or a flat fee of \$2000 (Transcript of proceedings in 741-61, pages 326-327, 381-383). The charge was denied by Wallace. On the day before the trial ended, Laughlin filed a Motion For Lie Detector Test, asking the court to require both Forte and Wallace to submit to such a test and further asking the court to admit the results in evidence. Government counsel opposed the motion on the grounds that the giving and grading of such tests would unduly delay the trial and that any evidence of obstruction of justice, a matter collateral to the issues at the trial, should be presented to a Grand Jury. He mentioned that "a Grand Jury should be immediately convened upon the conclusion of the trial and all evidence of any obstruction of justice should be presented." (Page 11, Transcript of hearing on Motion For Lie Detector Test, filed in Criminal No. 741-61).

^{4/} The District Court file, as well as the transcript of proceedings, in Criminal Case No. 599-63 are also part of the record on appeal.

Evidence Of Appellants' Guilt

So that the roles of the witnesses and the details of their testimony might be more clearly understood by the Court, the broad outlines of the evidence will first be drawn. Forte, charged in Criminal No. 741-61 with having attempted and procured an abortion on Jean Smith, desired that the case be dismissed or that the proof against him fail. To this end he caused certain sums of money to be delivered to Jean Smith. The money was intended as a reward to Smith for either not appearing at trial or for testifying falsely in the event she did appear. Bernice Gross was the intermediary who transmitted the money from Forte to Smith. Dorothy Birge was also asked to contact Smith on behalf of Forte. Laughlin, Forte's lawyer, conspired to carry out his client's illegal purposes and ^{he} himself, through the agency of Bernice Gross, sought to corruptly influence the witness Smith.

Testimony of Jean Smith

Mrs. Smith received a phone call from Bernice Gross in "maybe February" of 1962 (Tr. 36, 39).^{5/} They spoke about Criminal No. 741-61. Smith said she wished she didn't have to take part in the case, and Gross replied "it would probably never come to trial anyway." "[S]he (Gross) said one of those things that I could do was not be able to identify him (Forte) . . . that was said more than once." (Tr. 40-41).

Smith next heard from Gross in September or early October, 1962. Again the conversation concerned 741-61, Gross suggesting that she write a

^{5/} A great variety of transcripts will be referred to in this brief. Only two symbols will be used, however, to denote transcript references. The symbol 'Tr.' will denote a reference to the transcript of trial proceedings before Judge Hart. The symbol 'Mot. Tr.' will denote a reference to the 372 page transcript of pre-trial proceedings before Judge Hart on April 14-16, 1964. All other transcripts referred to will be fully identified.

letter requesting to be dismissed from the case (Tr. 42, 44-45). Smith wrote such a letter (Government's Exhibit 1) (Tr. 43). Shortly thereafter Gross called to say "she had a little present for me . . . for sending the letter in." (Tr. 45-46). The present consisted of \$75 in cash (Tr. 48).

In November, 1962, Gross came to Smith's house, the latter being then pregnant. Gross gave her a \$100 bill, explaining "I told them the reason you hadn't gone to a doctor was maybe you couldn't afford to." (Tr. 52-53). At the suggestion of Gross, Smith went to a Dr. Klein who in turn recommended an obstetrician named Goldberg (Tr. 49-50). A letter was then written by Goldberg to the United States Attorney (Government's Exhibit 2), and Gross soon called to say that the letter had been received, "that they were very pleased, and that the case definitely would be extended now, at least until January." (Tr. 51). A meeting was arranged by Gross, who "said they were so glad to have the case postponed again until at least January, she had another little gift for me." (Tr. 54). This time the gift was \$200 in cash (Tr. 55). Another gift from Gross, a baby's layette, was soon forthcoming because, Gross said, "the lawyer was so glad to have an extension of time" (Tr. 60-61).

"Several times" prior to January 20, 1964, Gross called concerning a letter which, according to Gross, "the lawyer" suggested that Smith write (Tr. 57, A-9). The letter, addressed to Mr. Acheson, was to request that Mrs. Smith be excused as a witness in 741-61 and was to be signed both by Mrs. Smith and her husband (Tr. 58-59, 97). Mrs. Smith wrote such a letter (Government's Exhibit 3), many of the ideas and phrases therein having been supplied by Gross, who "said she'd been talking to the lawyer on the phone" (Tr. 58). The "little gift" for sending this letter was \$150 in cash (Tr. 62).

"Just about every time we talked," Gross suggested that Smith "could forget to identify and so on" (Tr. 63). She also suggested that it would be possible to "answer a lot of questions with 'I don't remember' or 'I don't know'" (Tr. 102).

Mrs. Smith acknowledged that the letters written by her to the United States Attorney reflected her actual feelings in the matter of 741-61 and that she wasn't coerced into writing them (Tr. 112). She said she felt under no obligation as a result of the gifts of money and had in fact appeared as a witness and testified fully in the trial of 741-61 (Tr. 69, 112).

Testimony of Dorothy Birge

In early September, 1961, this witness received a telephone call from Forte, who identified himself by name and whose voice she recognized. Forte asked the witness to contact Jean Smith and tell her (Smith) "that she could have her money back." (Tr. 133). Forte said he wanted Smith "to have a complete lapse of memory on the stand." (Tr. 134).^{6/}

Testimony of Bernice Gross

After this witness, an unindicted co-conspirator, was discharged from the Baltimore police force early in 1962, she went to work for the Hecht Company at their Northwood store in Baltimore (hereinafter called the Northwood store).

6/ The count in the indictment which charged Forte with corruptly endeavoring to influence Dorothy Birge was dismissed on December 9, 1963, on motion of the United States. Appellants contend (Br. 8) that, this count having been dismissed, this witness should not have been permitted to testify or that the jury should have been instructed to disregard her testimony. The contention is utterly frivolous. Birge's testimony did not relate to the dismissed count. Rather it related directly to the count charging Forte with endeavoring to corruptly influence Jean Smith.

"Around May" of 1962 she received a telephone call from Forte, who identified himself by name (Tr. 152). Forte asked "if I had any contact with Jean Smith . . . [H]e asked me if I could help him as far as getting her to maybe not recognize him when the case would come to trial." (Tr. 157, 528). He added "that I would be taken care of, and so would Jean." (Tr. 158). In that conversation the witness agreed to "approach" Jean Smith. She did so but was rebuffed. Smith told her that she was "not the type that can lie" (Tr. 158). At the same time Smith indicated that she didn't want to proceed with the prosecution (Tr. 526). The result of the contact was reported by Gross to Forte (Tr. 159).

In September, 1962, the witness received another call from Forte. At that time Forte "told me that he had acquired a new attorney." The substance of the call was that "his attorney would get in touch with me and tell me what to do, or what to tell Jean Smith to do." (Tr. 161). The name of this attorney was "Mr. Laughlin" (Tr. 162).

In October, 1962, the witness received a telephone call at the Northwood store. The speaker identified himself as Mr. Laughlin (Tr. 163). "He wanted to meet me in person, and he asked me about Jean Smith, how long had I known her, was she the type of person that would be blackmailing Dr. Forte for months and months to come, or just what type of person she was, and I told him I didn't think she was that type of person." (Tr. 164).

That evening Laughlin came to the Northwood store. He spoke with the witness for "fifteen or twenty minutes" in the third floor lounge (Tr. 165-167). "I think he asked me (at that time) to get her (Smith) to write this letter (Government's Exhibit 1). I don't remember." (Tr. 166). Laughlin handed the witness his business card and said: "I'll keep in touch with you." (Tr. 240, 710).

Prior to October 15, 1962, and pursuant to Laughlin's directive that she "tell Jean Smith to write a letter that she did not want to appear as a witness," the witness contacted Smith by phone (Tr. 168, 532-534). "I told her to write this letter and she did, and she would be taken care of." (Tr. 168). Shortly after "speaking to Smith, the witness heard from either Forte or Laughlin that the letter (Government's Exhibit 1) had been received at the United States Attorney's office (Tr. 169).

Soon after this letter was written, the witness was called by Jean Smith. Smith said she needed and was willing to accept money. This message was relayed by Gross to either Forte or Laughlin (Tr. 170-171).

"Maybe a week later," still in October, 1962, Forte called the witness and arranged to meet her at the Chesapeake Club in Baltimore (Tr. 172). A meeting took place at which Forte gave the witness \$100. The money, he said, was for Jean Smith. The witness delivered \$75 to Smith and kept \$25 for herself. (Tr. 172-174).

In November, 1962, the witness again met Forte at the Chesapeake Club. There she received a \$100 bill which she subsequently delivered to Smith. Her recollection was that this money "was for this letter she (Smith) had written." (Tr. 181-184).

At still another meeting with Forte at the Chesapeake Club later in November, 1962, the witness received \$200 to pass on to Smith. "It (the money) was supposed to go to a doctor, for Jean. She hadn't gotten an obstetrician yet and I believe she was in her seventh month. She said she couldn't afford one." The money was turned over to Smith in the Northwood store. Forte had recommended Dr. Klein and Dr. Goldberg and their names were suggested by the witness to Smith (Tr. 184-188).

With respect to the letter from Dr. Goldberg dated November 13, 1962, (Government's Exhibit 2), Laughlin had told the witness "that it would be better if she had gotten a letter from a doctor saying that she (Smith) was pregnant and couldn't attend the trial." (Tr. 231). On or about November 15, 1962, the witness was told by either Forte or Laughlin that the letter from Dr. Goldberg had been received in the United States Attorney's office, and as a result "they hoped that it (the case) would be dismissed." (Tr. 188-189).

For Christmas, 1962, the witness was given a present of \$100 by Forte (Tr. 189-190, 538-539).

On January 18 or 19, 1962, the witness spoke to Laughlin on the telephone about the letter which he had requested that Jean Smith and her husband write (Government's Exhibit 3). He said that the joint letter "would be a better reason for dismissing the case." He also provided some of the words to be used in the letter (Tr. 220-225).

Shortly after January 20, 1962, the witness heard from Laughlin that the letter had been received in the United States Attorney's office. He told her "that he thought it would be dismissed, the case would be dismissed after that." (Tr. 224-226). She told Laughlin that "she (Smith) should get the money for writing the letter." Laughlin replied "that he would get in touch with Dr. Forte." (Tr. 226-227). The witness then received a communication from Forte, as a result of which she met him at the Chesapeake Club and received \$200 which she later turned over to Smith at the Northwood store (Tr. 228-229).

Including the \$100 Christmas present which was given to her, the witness received "in the vicinity of \$650" from Forte (Tr. 539). She met

Forte at the Chesapeake Club between four and six times (Tr. 541). She met Laughlin only once and never received any money from him (Tr. 543, 703). She spoke to Laughlin frequently on the phone, however, and by referring to telephone records and bills was able to recall the dates of those calls (Tr. 243-260). They all involved Criminal No. 741-61 (Tr. 259). Many of the conversations concerned "Jean Smith and what she would do, whether she would--is she the type that would blackmail the doctor after the trial." (Tr. 299).

Telephone Records

The credibility of Bernice Gross was impeached by her own admissions that she had perjured herself in connection with the very matters to which she was testifying at trial, during two appearances before a Grand Jury on March 1, 1963^{7/} (Tr. 572-580, 686). On the other hand her testimony was corroborated by telephone records, kept in the regular course of business, which tended to indicate that she had in fact spoken with Forte and Laughlin at the times indicated by her.

At all times material to the charges contained in the indictment, telephone numbers of the parties concerned were as follows: Laughlin's office phones: National 8-1690, National 8-2001 (Washington); Laughlin's home phone: EMerson 2-1776 (Washington); Forte's office phone: TAYlor 9-3377 (Washington); Gross' business phone: IDlewood 3-8000 (Baltimore); Gross' home phone: FOrest 7-7440 (Baltimore). The records in evidence

7/ In the first Grand Jury appearance on March 1, 1963, Gross denied having been contacted by Forte or anyone acting in Forte's behalf in connection with the Smith abortion case. In her second appearance on March 1, she denied ever having met Laughlin face to face.

consisted of (1) punch cards containing information on long-distance calls charged to these numbers, including date of call, time of connection, length of call, and name of one or both parties in collect or person-to person calls; (2) monthly billings on these numbers showing, as to each call, amount of charges, date, type of call, and number called. The records tended to establish the following (Tr. 820-941):

December 1, 1962: collect person-to-person call from Gross to Forte

December 3, 1962: collect person-to-person call from Gross to Forte

December 18, 1962: collect person-to-person call from Miss Bee to Forte^{8/}

January 7, 1963: collect station-to-station call from Gross to Forte's office number

October 11, 1962: direct dial call from Laughlin's office number to Gross' business phone

October 16, 1962: person-to-person call from Laughlin's office number to Bernice Gross

October 18, 1962: direct dial call from Laughlin's office number to Gross' business phone

October 22, 1962: same

October 22, 1962: same

October 26, 1962: same

October 29, 1962: collect person-to-person call from Gross to Laughlin

November 8, 1962: same

November 9, 1962: person-to-person call to Gross from Laughlin's office number

^{8/} Gross testified that in February, 1963, Forte told her to use the name Miss E if she ever called him (Tr. 229).

November 13, 1962: direct dial call from Laughlin's office number to Gross' business phone

November 27, 1962: collect person-to-person call from Gross to Laughlin

January 18, 1963: person-to-person call from Laughlin's office number to Gross

February 7, 1963: same

February 12, 1963: direct dial call from Laughlin's office number to Gross' home number

February 12, 1963: direct dial call from Laughlin's home number to Gross' home number

February 13, 1963: direct dial call from Laughlin's office number to Gross' home number

February 19, 1963: person-to-person call from Gross' home number to Laughlin

February 27, 1963: same

February 28, 1963: direct dial call from Laughlin's office number to Gross' home number

Evidence As To Appellant Laughlin Only

There were admitted into evidence, against appellant Laughlin only, tape recordings of four telephone conversations between himself and Bernice Gross (Tr. 362). At trial the recordings were played once to the jury in the presence of Bernice Gross (Tr. 320-341^{9/}), who identified the voices, and again during closing argument by the prosecutor (Tr. 1041-1048, 1052-1058). At the pre-trial hearing on appellant Laughlin's motion to suppress these

^{9/} There are two transcripts of the tape recordings in the record on appeal. One appears as part of the volume containing the pre-trial hearing (Mot. Tr. 98-116). The other is a separate volume marked pages B-2 through B-23. A court reporter's note at Tr. 320 explains that pages B-2 through B-23 should be renumbered and inserted as pages 320-341.

tapes, and at the trial itself, there were developed facts relevant to the issue of whether the telephone calls were made and recorded with the consent of Bernice Gross. In finding consent on the part of Gross, the trial judge in the instant case reached a result contrary to that which had been reached when the same issue was twice considered in connection with Criminal No. 599-63. United States v. Laughlin, 222 F.Supp. 264 (1963) (declaration of mistrial by Judge Youngdahl); United States v. Laughlin, 223 F.Supp. 623 (1963) (dismissal of indictment by Judge Curran). The facts relevant to the issue of consent are summarized in Argument II, infra. The nature of the prior judicial proceedings, the rulings made therein and the effect of those rulings on the instant case, Criminal No. 600-63, are examined in Argument III, infra.

At the pre-trial hearing, Assistant United States Attorney Harold Sullivan, at whose request the telephone calls were placed, explained how and when the recordings were made (Mot. Tr. 118-137): two of them were made following the second appearance of Bernice Gross before the Grand Jury on March 1, 1963; a third was made on March 13, 1963, another day on which Gross appeared and testified before the Grand Jury; the fourth was made on March 18, 1963.^{10/} All the calls were placed by Mrs. Gross from the office of Mr. Acheson, the United States Attorney; Mrs. Gross placed each call from the telephone at the south end of the office; in each case one end of an induction coil was positioned beneath the base of a regularly used extension telephone at the north end of the office; the other end of the

^{10/} A fifth Gross-Laughlin call was also made on March 18, 1963. The apparatus was not properly adjusted, however, and the recording was inaudible (Mot. Tr. 114-115).

induction coil was plugged into a recording machine; the coil was not physically attached to the telephone; by a principle of magnetism, however, when the receiver was lifted from the cradle the sound impulses coming into the extension telephone were transmitted through the coil to the recording machine.

Mrs. Gross of course knew the conversations were being recorded. Appellant Laughlin did not. Sullivan testified that he suggested a line of conversation to be followed by Gross in connection with each call (Mot. Tr. 131-134, 182, 184). The purpose of the calls generally were to ascertain whether Gross was telling the truth when she stated she had had contacts with Laughlin in connection with the Smith abortion case, and to determine whether Laughlin was culpable in this matter (Mot. Tr. 154, 184, 194).

In the first conversation of March 1, 1963 (Tr. 322-326), Gross reported that she had been before the Grand Jury. "I think they are on to us," she said, in response to which Laughlin asked: "Well, you didn't admit anything did you?" Describing the day's inquiry, Gross said "they wanted to know how much money he has given me." Laughlin replied: "Yes, well, he hadn't given you anything."

In the second conversation of March 1, 1963 (Tr. 328-330), Gross spoke again about her predicament and this exchange occurred (Tr. 330):

"LAUGHLIN: After all, of course you did pick a beauty in that Miss Smith. You said she was 100 carat--she was solid gold.

"GROSS: Well, who knows.

"LAUGHLIN: Well, however. Of course, I saw the woman. I mean the woman is--well, she's just a tramp. Anybody that--you know--that would take help and then bite the hand that feeds them and so on, well, she's

just absolutely worthless. But--no, if you need somebody let me know. Maybe--and as far as you're concerned, maybe--you told--you didn't know me, didn't you?

"GROSS: No, I told them I didn't know--I had never had any contact with you.

"LAUGHLIN: That's right, that's right. So, anyway, if you find you're coming back, give me a ring sometime Monday, see, and I'll see that you have somebody, see. You do that now."

The topic of conversation on March 13, 1963 (Tr. 332-337), was Jean Smith. With reference to Smith, Laughlin remarked: "Well, you sure picked out a lemon in her, didn't you?"

In the conversation of March 18, 1963 (Tr. 338), Gross reported that she had received another subpoena and Laughlin told her to "do whatever you think is best now."

Since all four conversations took place after the termination of the conspiracy alleged in the indictment, they went to the jury under limiting instructions concerning post-conspiracy statements (Tr. 261, 307, 1153-1154). Twenty-seven instructions tendered by appellants were denied. One request for instructions was granted as submitted, two were granted in substance, and one was granted as amended.

STATUTES INVOLVED

Title 18, United States Code, Section 371, provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 1503, provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Title 28, United States Code, Section 144, provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Title 47, United States Code, Section 605, provides in pertinent part:

. . . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

SUMMARY OF ARGUMENT

I

The trial judge properly refused to disqualify himself on the basis of an affidavit of bias and prejudice filed two days after the case had been assigned to him for trial by an affiant who had been before him on both those days seeking favorable action on motions to suppress evidence and dismiss the indictment. Under a statute which makes timeliness of the essence, a litigant cannot sample the temper of the court before presenting a claim of disqualification. Moreover, on this record the filing of the affidavit may be traced directly to rulings of the trial court adverse to affiant.

II

The contents of four telephone conversations between a witness and the accused overheard and recorded with the consent of the witness, were admissible against the accused at trial. Listening in to a telephone communication with the consent of one of the parties is not a prohibited 'interception' within the meaning of the Federal Communications Act. Nor does recording the conversation by means of an induction coil make it so.

Here the finding of consent to listen on the part of the witness was supported by substantial evidence and should not be overturned. In the absence of government misconduct consent was not vitiated by the fact that the witness reasonably thought it in her own best interests to cooperate in making the calls.

III

The government was not precluded from litigating the consent question. That doctrine makes conclusive upon the parties in a subsequent proceedings only matters distinctly placed in issue, actually litigated, and finally determined in a prior suit. Here appellant sought to support his claim of estoppel on a prior order

declaring a mistrial and a prior order dismissing an indictment. The mistrial order was interlocutory only and thus had no collateral consequences. The dismissal order, while a final judgment, was not conclusive on the question of consent because that question was not placed in issue or litigated therein and was not determined thereby.

IV

The rule that post-conspiracy statements are admissible against the declarant only does not bar the live courtroom testimony of one co-conspirator against the others.

With reference to the tape recordings, the court properly instructed the jury that they were admissible only against Laughlin, only in the event a conspiracy was found to exist, and only for the limited purpose of connecting him with that conspiracy.

V

The motion to dismiss the indictment on the ground of grand jury bias was properly denied. The only evidence in support of this motion was insubstantial and controverted.

The motion to dismiss the indictment on the ground that a grand jury had been improperly utilized to prepare the pending indictment for trial was properly denied. Even had there been any showing in support of this motion, which there were not, appellants would not have been entitled to dismissal of the indictment.

ARGUMENT

- I. The affidavit of bias and prejudice was filed out of time and the trial judge properly refused to disqualify himself

(See Mot. Tr. 3, 314-315, 319-320; Tr. 198)

On the morning of April 14, 1964, the assignment court referred this case to Judge Hart "for trial"^{11/} (Mot. Tr. 3). Pending at that time were appellants' motions to suppress evidence and to dismiss the indictment. Disposition of these motions required two full court days of testimony and argument. Late in the afternoon of April 15, 1964, the hearing concluded with rulings favorable to the prosecution on both motions (Mot. Tr. 314-315). Just prior to adjournment of the proceedings on that day,

^{11/} In their brief, appellants profess not to understand how the case came to be assigned for trial to Judge Hart (Br. 66). They point to an order of the District Court, dated March 10, 1964, assigning Judge Hart to Motions Court No. 2 "effective from and including April 7, 1964, until further order of the Court." (A copy of this order was attached to the Supplement to Affidavit of Bias and Prejudice filed by appellants on April 20, 1964; that order was referred to in their motion for a new trial (p. 7); another was attached to their motion in this Court for summary reversal). Clearly implied by appellants is the charge that Judge Hart reached out for this case in spite of or in disregard of his assignment to Motions Court.

On May 6, 1964, appellee opposed appellants' motion for a new trial. Attached to its opposition was a copy of the District Court Memorandum, dated April 6, 1964, stating that "by agreement of the Judges involved they will rotate their regular assignment for the months of April, May, and June" and going on to show that Judge Hart accepted reassignment to Criminal Court No. 5 for the month of April, 1964. This Memorandum is in the record on appeal and is reproduced in Appendix A of this brief. There may also be found in the record on appeal the courtroom log of Judge Hart for the month of April, 1964. Examination of the log (which was made a court exhibit in the motion for a new trial and is reproduced as Appendix B of this brief) reveals that Judge Hart, pursuant to the Memorandum referred to above, commenced sitting in Criminal Court on April 7, 1964, and that during the month of April he disposed of numerous criminal matters and presided at several criminal trials in addition to Criminal No. 600-63, United States v. Forte and Laughlin.

The District Court Memorandum of April 6, 1964, and the courtroom log of Judge Hart conclusively refute appellants' suggestion that the case was assigned to Judge Hart otherwise than in the regular and ordinary course of the District Court's business.

appellant Laughlin stated to Judge Hart: "I don't believe Your Honor could fairly try the case in view of these rulings." (Mot. Tr. 315). He also alluded to "comments you (Judge Hart) have made during the day."

When the proceedings resumed on the morning of April 16, 1964, appellant Laughlin, purporting to act under 28 U.S.C. § 144, presented for filing an affidavit of bias and prejudice accompanied by both his and his attorney's certificate of good faith. In the affidavit Laughlin set forth the following: (1) that Judge Hart had approached him in June, 1959, with a request that he (Laughlin) testify in his (Hart's) behalf before the Judiciary Committee of the United States Senate. (Presumably, although it is not specified in the affidavit, this Committee was considering whether to confirm Judge Hart's appointment to the District Court.); (2) that Judge Hart had then stated that affiant Laughlin's testimony would be useful because of his (Hart's) inexperience in criminal matters and because he (Hart) had drawn criticism for his opposition to the Mallory Rule; (3) that affiant Laughlin had agreed to testify "but further stated to the said judge that it was a matter of comment that the said judge had been closely allied with the police;" (4) that affiant Laughlin, on June 16, 1959, had in fact testified at a Senate Judiciary Committee hearing involving Judge Hart; (5) that affiant Laughlin had informed the Committee "that he could only give Judge Hart only a qualified endorsement on account of his close affinity to the police and that he (Hart) should alter his stand as to

police practice." The affidavit closed with a prediction that "Judge Hart, due to his close affinity to the police as already referred to, will endeavor in every way possible to protect Wallace and to rule out any attempt on the part of the affiant to bring to the attention of the jury the role played by Wallace and others allied with him in this case."

Judge Hart declined to disqualify himself on the ground that the affidavit of bias and prejudice was not timely filed.^{12/} His action in this regard was altogether proper.

^{12/} Appellants contend in their brief, as Laughlin did in the Supplement to Affidavit of Bias and Prejudice filed on April 20, 1964 (Tr. 198), that Judge Hart violated the mandate of 28 U.S.C. § 144 by disputing the truth of certain matters set forth in the original affidavit of prejudice. It is quite true that Judge Hart denied some of the allegations contained in Laughlin's affidavit. It clearly appears, however, that Judge Hart recognized that the statute required him to accept these allegations as true, and that he based his rejection of the affidavit not on the ground that it was legally insufficient but rather on the ground that it was not timely. His ruling was cast as follows (Mot. Tr. 319-320):

"Mr. Laughlin, I have read your affidavit, and although I cannot, under the rules and under the statute, concern myself with the truth or falsity of it, I cannot help but remark that there are matters in there alleged against me personally, such as that I approached you in the National Press Building in 1959 asking if you would testify on my behalf, which are not true. However, your motion comes too late. This case was not sent to me on the 14th for trial. You announced no bias at that time in these matters which you say go back to 1959. Had you announced bias at that time I would have immediately disqualified myself, but you wait until after the preliminaries of the trial start and are concluded and then after the court rules against you on a motion you then, for the first time, suggest bias. At that time the suggestion of bias comes too late and does not come within the time limits set by Title 18, Section 144. Now, it (Continued on next page)

The applicable statutory provision, 28 U.S.C. § 144, requires that the (District Court) judge "before whom the matter is pending" shall "proceed no further therein" if one of the parties "files a timely and sufficient affidavit" alleging prejudice. The affidavit must state the facts and the reasons for the belief that bias or prejudice exists, and must, according to the statute, be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."

12/ (Continued from preceding page)

is true that Title 28, Section 144, provides that the affidavit shall be filed ten days in advance. That does not apply in this jurisdiction because, of course, under our master calendar system counsel does not know ten days in advance what judge will receive the case, but it does apply to this extent, that it must be a reasonable length of time, which is at the beginning of the proceedings, and had you announced at the beginning of these proceedings that you felt that I was prejudiced, I would have recessed the matter to permit you to file an affidavit, and I would have then disqualified myself, but having waited until the motions were heard and the Court ruled against you, the court case having been sent here two days ago for trial, and having announced that we would start the trial this morning, I rule that your affidavit comes too late and I will deny it.

Since the privilege which the statute extends to the party litigant may be easily abused, "strict compliance with its provisions is required." Skirvin v. Mesta, 141 F.2d 668, 672 (10th Cir. 1944); cf. Bishop v. United States, 16 F.2d 410, 411 (8th Cir. 1926). "The requirement of timeliness is of fundamental importance." In Re United Shoe Machinery Corporation, 276 F.2d 77, 79 (1st Cir. 1960). "Time is a matter of substance and not merely one of form." United States v. 16,000 Acres of Land, 49 F.Supp. 645, 656 (D.C. Kan. 1942). The statute makes time of the essence "for the obvious purpose of preventing their (the affidavits') use as a device to obtain last minute postponements of trial and to prevent a litigant from sampling the temper of the court before deciding whether or not to file an affidavit of prejudice" Peckham v. Ronrico Corporation, 288 F.2d 841, 843 (1st Cir. 1961).

Appellee realizes, as did Judge Hart (Mot. Tr. 320), that the provision of the statute requiring that the affidavit be filed "not less than ten days before the beginning of the term of court" is not here applicable because the case was not assigned to Judge Hart until two days before trial. Cf. Willenbring v. United States, 306 F.2d 944, 945 n. 2 (9th Cir. 1962); Eisler v. United States, 83 U.S. App. D.C. 315, 170 F.2d 273 (1948), cert. dismissed, 338 U.S. 883 (1949). It by no means follows, however, that Laughlin was free to wait until the morning of trial before filing his affidavit. For wherever the ten-day provision is for some reason

not applicable, the statute nevertheless requires that a party act promptly and diligently in presenting a claim of disqualification. Faubus v. United States, 254 F.2d 797 (8th Cir. 1958) (where hearing on petition for preliminary injunction scheduled for September 20, affidavit held untimely when filed on September 19 by a litigant made a party to the suit on September 10); Bommarito v. United States, 61 F.2d 355 (8th Cir. 1932) (where affiant represented that knowledge of bias and prejudice did not come to him within ten-day period, affidavit nevertheless held untimely when it appeared that affiant was in possession of facts four days before trial but waited until day of trial to file); Bishop v. United States, supra (where ten-day provision did not apply because case was set for trial at same term during which indictment was returned, affidavit not presented until day of trial held untimely); Chafin v. United States, 5 F.2d 592 (4th Cir. 1925) (where indictment found after beginning of court term, and ten-day provision therefore inapplicable, affidavit filed on day of trial ruled untimely). And see Rossi v. United States, 16 F.2d 712, 716 (8th Cir. 1936).

If the indictment is returned after the term of court has begun, or the ten-day provision is for some other reason inapplicable, the affidavit, in order to meet the timeliness requirements of the statute, "must be filed as soon as the disqualifying facts are known." Bishop v. United States, supra, 16 F.2d at 411; Chafin v. United States, supra, 5 F.2d at 594. Measured by

this standard, the affidavit filed by appellant Laughlin was clearly untimely, it showing on its face that the facts alleged therein were known to Laughlin long before trial. Certainly none of these facts came to light during the two days which elapsed between the assignment of this case to Judge Hart on April 14 and the actual beginning of trial on April 16. In fact, Laughlin spent most of both these days before Judge Hart seeking favorable action on his motions to dismiss the indictment and to suppress evidence, and never once during this period did he suggest bias or prejudice. This conduct alone would be enough to render untimely the affidavit filed on April 16. "An affidavit filed long after the time fixed by the statute, and after the party making the affidavit has participated in proceedings and has invoked or sought to invoke the affirmative action of the court in his behalf, without any cause shown for the delay, does not comply with the exaction of the statute in respect to time." Skirvin v. Mesta, supra, 141 F.2d at 672. To the same effect is Tennessee Pub. Co. v. Carpenter, 100 F.2d 728, 734 (6th Cir. 1938), cert. denied, 306 U.S. 659 (1939).

Appellee submits that the real basis for the claim of prejudice against Judge Hart was exposed by an incident which occurred on April 15 at the conclusion of the hearing on appellants' motions. No sooner had the motions been denied than appellant Laughlin remarked: "I don't believe Your Honor could fairly try the case in view of these rulings." (Mot. Tr. 315)

That the affidavit of bias was filed the following morning cannot rationally be interpreted otherwise than as a response by Laughlin to the adverse rulings. It was just such an abuse of the statutory privilege conferred by Section 144 that its requirement of timeliness was designed to prevent.

"One of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives."

In Re United Shoe Machinery Corporation, supra, 276 F.2d at 79.

Appellant Laughlin is no stranger to the requirement that an affidavit be timely filed. In Laughlin v. United States, 80 U.S. App. D.C. 101, 151 F.2d 281 (1945), cert. denied, 326 U.S. 777, another of his affidavits was held to have been filed out of time. So fitting is the language of that decision to the present circumstances that it bears repeating:

"The paper [affidavit] shows on its face that the alleged bias on which disqualification was sought had been known to appellant for years. His action, therefore, in deliberately holding back the filing until after the first day's proceedings and after Judge Bailey had ruled on sundry matters, and after he had, at appellant's request, granted a continuance, was not only not a showing of good cause for the delay, but, as the Judge properly held, a waiver of appellant's statutory right to a consideration of the affidavit." 80 U.S. App. D.C. at 104, 151 F.2d at 284.

II. The tape recordings of telephone conversations between Bernice Gross and Appellant Laughlin were properly admitted in evidence

(See Mot. Tr. 124-127, 276, 278, 282-283, 299-303; Tr. 261, 302, 362, 937, 1041-1048, 1052-1058, 1153-1154)

At the various times indicated and under the circumstances already described in appellee's Counterstatement herein, four telephone conversations between Bernice Gross and appellant Laughlin were recorded on tape in the office of the United States Attorney. In each instance a call was placed by Gross to the known office telephone number of Laughlin. In each instance connection was made with a voice which Gross recognized as being that of Laughlin. In each instance the ensuing conversation was recorded by means of an apparatus consisting of an induction coil, one end of which was set beneath the base of a regularly used extension telephone and the other end of which was plugged into a tape recording machine. All four recordings were received in evidence ^{13/} (Tr. 362). Appellant Laughlin contends that the manner in which the recordings were obtained violated the Federal Communications Act,

^{13/} The evidence was admitted against Laughlin only and was covered by proper instructions concerning post-conspiracy statements. See Argument IV , supra.

47 U.S.C. § 605, and abridged his rights under the Fourth and Fifth Amendments^{14/} to the Constitution. Appellee disagrees on both counts.

Appellant's Constitutional Rights Were Not Infringed

The Supreme Court has long since rejected appellant's constitutional arguments. In Olmstead v. United States, 277 U.S. 438 (1928), it was held that wiretapping, at least where it involved no intrusion onto a defendant's premises, was violative of neither the Fourth or Fifth Amendments. The Olmstead ruling

^{14/} Appellants urge a number of other points of error in connection with the admission of the tapes. None of these require lengthy discussion.

(1) They claim that the court erred in permitting the tapes to be played during closing argument by the prosecutor (Tr. 1041-1048, 1052-1058). But the permissible extent of comment and argument by the prosecutor is a matter addressed to the sound discretion of the trial court. United States v. Schwartz, 325 F.2d 355 (3d Cir. 1963). There can be no abuse of this discretion where argument is confined to the evidence and legitimate inferences drawn therefrom. United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958); Brennan v. United States, 240 F.2d 253 (8th Cir.), cert. denied, 353 U.S. 931 (1957). No abuse of discretion has been found where sample implements of crime not even in evidence were displayed to the jury during closing argument, Sanders v. United States, 238 F.2d 145 (10th Cir. 1945), where enlarged tax schedules showing the government's computations of appellant's income were used as an aid to argument in a tax evasion case, Hanson v. United States, 254 F.2d 359 (6th Cir.), cert. denied, 358 U.S. 833 (1958), or where charts graphically illustrating the government's version of the evidence were employed in argument. Holland v. United States, 209 F.2d 516 (10th Cir.), affirmed, 348 U.S. 121 (1954). Certainly no abuse occurred in this case where, for from drawing any unwarranted inferences from the evidence, the prosecutor let the evidence speak for itself.

(2) Appellant Forte argues that the admission of the tapes against his attorney Laughlin entitled him to a severance. He is speaking, of course, about a severance of defendants. At trial, however, it appeared that he was seeking a severance of counts. (See Tr. 987, where Laughlin, in his role as attorney for Forte, moved the court "that there be a severance in this case that -- Dr. Forte is willing to testify as to Count 2, but not as to Count 1." And see Tr. 208, where in moving for a severance for the first time on behalf of Forte,

14/ (Continued from preceding page)

Laughlin placed his reliance on Cross v. United States, D.C. Cir. 17596, decided March 26, 1964, a case dealing with severance of counts.)

However construed, Forte's motions were properly denied. If construed as motions for a severance of counts, then Forte fell far short of making the showing of prejudice required by Rule 14, Fed. R. Crim. P. Since the joined conspiracy and substantive offenses were essentially the same crime provable by the same evidence, there is no possibility that the jury "used the evidence of the one crime to convict of the other or cumulated the evidence to find guilt under both charges." Drew v. United States, _____ U.S. App. D.C. 331 F.2d 85 (1964). And cf. Cross v. United States, *supra*.

If construed as motions for a severance of defendants, then Forte was still defeated by the Rule 14 requirement that actual prejudice be affirmatively shown. Schaffer v. United States, 362 U.S. 511, 515-516 (1960). The mere fact that evidence against one defendant is not admissible as against another is not a conclusive ground for severance. Dykes v. United States, 114 U.S. App. D.C. 189, 313 F.2d 580 (1962), cert. denied, 374 U.S. 837 (1963); Hall v. United States, 83 U.S. App. D.C. 166, 168 F.2d 161 (1948), cert. denied, 334 U.S. 853; Lucas v. United States, 70 U.S. App. D.C. 92, 104 F.2d 225 (1939). Here the only evidence against Laughlin inadmissible as against Forte was the tape recordings. Forte was not named anywhere in those recordings. Any statements therein which could possibly be taken as referring to him were made by Gross and were therefore in the nature of prior consistent statements by a trial witness rather than hearsay declarations of a co-conspirator. Moreover, there was no practical method of deleting the references to him, assuming such references to exist. Cf. Delli Paoli v. United States, 352 U.S. 232, 237 (1957). Compare Oliver v. United States, _____, U.S. App. D.C. _____, 335 F.2d 724 (1964); Greenwell v. United States, D.C. Cir. No. 18,193, decided August 13, 1964. Finally, if any doubt remains, the jury was thrice instructed that post-conspiracy statements were admissible against the declarant only (Tr. 261, 302, 1153, 1154).

(3) Appellant Laughlin claims that the recordings were made in violation of existing Department of Justice directives. He cites no such directives. Moreover, the policies to which he refers (Br. 29-31) are obviously administrative in character and have no application in the area of criminal investigation. Such policies are hardly a proper basis for excluding evidence in a federal court.

has been consistently reaffirmed in a line of decisions sustaining against constitutional challenge the use of various listening devices to overhear conversations beyond the reach of the human ear. Goldman v. United States, 316 U.S. 129 (1942); On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963). In these cases the only restriction traceable to the Constitution is the insistence that the listening device not be planted by an unlawful invasion into a constitutionally protected area. Silverman v. United States, 365 U.S. 505 (1961).

In the instant case there was obviously no entry, either physically or by device,^{15/} into any area where the government had no right to be. The recording machine and induction coil were set up in one of the government's own offices and the extension telephone was permanently installed therein. Since the use of this equipment involved no trespass, it likewise deprived appellant of no constitutional right.

The Federal Communications Act Was Not Violated

The Federal Communications Act, 47 U.S. C. § 605, provides in pertinent part: "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The

^{15/} In Goldman, On Lee, and Lopez the listening devices were set up so as to overhear conversations occurring wholly within defendants' private offices. It was argued that an intangible form of trespass was committed in that the device surreptitiously brought the government into a protected area. No such argument is available to appellant here.

question whether an "interception" within the meaning of the Act occurs when a third party listens in to a telephone conversation by means of an extension phone or other device has been much discussed. It is, in the special circumstances presented by this record, the question now before this Court.

Appellee believes that the question will emerge in clearer perspective if it is recognized at the outset that, if Laughlin's conversations with Gross were lawfully overheard, then the means used to accomplish this end are entirely unimportant. And the fact that the conversations were recorded is likewise immaterial. "[W]e do not understand that the mechanical nature of the method of overhearing is now to be the guidepost in this area . . . We find no distinction between holding out the handset and permitting an outsider to hear through the use of an induction coil. Nor does the recording of this legally overheard conversation render the overhearing and divulging of the conversation improper." Carbo v. United States, 314 F.2d 718, 739 (9th Cir.), cert. denied, 377 U.S. 953 (1963). "[N]or does such testimony [by a third party about a telephone conversation] become inadmissible simply because recorded or overheard by electrical or mechanical device." Wilson v. United States, 316 F.2d 212^{,213} (9th Cir. 1963). "[I]t seems clear that the recording of a telephone conversation is not distinguishable from permitting the entire conversation to be overheard by means of an extension telephone." Ferguson v. United States, 307 F.2d 787^{,789} (10th Cir. 1962), cert. granted, 374 U.S. 805 (1963), remanded on other grounds 375 U.S. 962 (1964).

"[T]he only function served by the recording is to preserve a permanent and accurate record of the conversation." Carnes v. United States, 295 F.2d 598, 602 (5th Cir. 1961), cert. denied, 369 U.S. 861 (1962). These authorities stand for the common sense proposition that an otherwise lawfully overheard conversation does not become tainted because it was recorded (here by an induction coil, a device which serves only to make both voices on the recording equally audible) and may thus be accurately reproduced in court.

A second point requires consideration at the outset of the argument. It is whether, where a conversation is overheard on an extension phone without the consent of one of the parties thereto, "interception" occurs within the meaning of the statute. The question is not wholly free from doubt. If it be answered in the negative, the present inquiry is at an end.

In Goldman v. United States, supra, two federal agents, by placing a 'detectaphone' with a delicate receiver against a partition wall, were able to hear what the accused said while talking over the telephone in his office. The accused was not aware of the device. The Supreme Court found no violation of Section 605.

"The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation.

What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission." 316 U.S. at 133.

With respect to the concept of interception, the Court said:

16/

"As has been rightly held, this word [intercept] indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver." 316 U.S. at 134.

17/

In 1957 the Supreme Court decided the Rathbun case. It there held that Section 605 did not require the exclusion in federal courts of the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation. Nothing was said in the opinion about the quality of the requisite consent. Nor was it held that the contents

16/ Citing United States v. Yee Ping Jong, 26 F.Supp 69 (D.C.W.D. Pa. 1939), and thereby impliedly rejecting the contrary definition of 'intercept' found in United States v. Polakoff, 112 F.2d 888,889 (2d Cir. 1940) ("... anyone intercepts a message to whose intervention as a listener the communicants do not consent."). See the concurring opinion of Judge Chase in Reitmeister v. Reimeister, 162 F.2d 691, 697 (2d Cir. 1947), for an expression of the view that the Polakoff decision did not survive the Supreme Court's decision in Goldman. In this connection see also United States v. Bookie, 229 F.2d 130 (7th Cir. 1956). And see comprehensive note on meaning of "interception" as used in the Communications Act in 53 Mich. L. Rev. 623 (1955).

17/ Rathbun v. United States, 355 U.S. 107 (1957).

of a conversation overheard on a telephone extension without the consent of one party were inadmissible. Both before and after the Rathbun decision, however, most federal courts which have considered the matter have found the question of "interception" to be bound up with the question of consent by one of the parties. Wilson v. United States, supra; Carbo v. United States, supra; United States v. Williams, 311 F.2d 721 (7th Cir. 1963); Ferguson v. United States, supra; Carnes v. United States, supra; Barbour v. United States, 105 U.S. App. D.C. 89, 264 F.2d 375 (1959), cert. denied, 360 U.S. 905; United States v. Bookie, supra; Rayson v. United States, 238 F.2d 160 (9th Cir. 1956); Flanders v. United States, 222 F.2d 163 (6th Cir. 1955); United States v. Alexander, 218 F.Supp. 916 (D.C.W.D. Pa. 1963); United States v. Pierce, 124 F.Supp. 264 (D.C.N.D. Ohio 1954), affirmed, 224 F.2d 281 (6th Cir. 1955); United States v. Sullivan, 116 F.Supp. 480 (D.D.C. 1953); United States v. Lewis, 87 F.Supp. 970 (D.D.C. 1950).^{18/}

Assuming, therefore, that the consent of one party, in this case Bernice Gross, must be shown in order to establish that appellant Laughlin's conversations were not unlawfully "intercepted", the facts relevant to the issue of consent will now be set forth.

^{18/} For a local case holding that the recording of a telephone conversation, even by or with the consent of one of the parties, is a prohibited interception, see United States v. Stephenson, 121 F.Supp 274 (D.D.C 1954). There, however, a device was attached to the wiring of the bell box of the telephone at the receiving end, and Judge Pine held that this constituted an "interception", stating that "both in space and time, the taking in this instance was before the arrival of the communications at the destined place." 121 F.Supp. at 277. The interference with the means of communication are sufficient to distinguish that case from the instant one.

Statement of Facts Relevant To Consent of Bernice Gross

A. First Appearance of Gross Before Grand Jury on March 1, 1963.

On the morning of March 1, 1963, Bernice Gross appeared under subpoena before the January 1963 Grand Jury. Gross, it will be remembered, was an ex-policewoman with extensive prior experience in the field of criminal investigation. An oath was administered and the scope of the inquiry being conducted was explained. After being advised of her privilege against self-incrimination by Assistant United States Attorney Harold Sullivan, Gross indicated a willingness to testify^{19/}. She was asked, among other things, whether Allan U. Forte or anyone representing himself to be acting on Forte's behalf had either offered or given her money or anything of value for any service or act on her part in connection with the alleged abortion of Jean Smith in 1961. She said^{20/} no.

B. Interview of Mrs. Gross by Mr. Sullivan and Mr. Hannon on March 1, 1963.

After being excused as a Grand Jury witness, Gross remained in the courthouse where, at the request of Mr. Sullivan, she appeared at 12:17 p.m. in the office of Assistant United States Attorney Joseph Hannon. There, in

^{19/} Page 4, transcript of testimony of Bernice Gross before the January 1963 Grand Jury on March 1, 1963, consisting of 11 pages.

^{20/} Pages 8-9, same transcript.

the presence of a reporter, she was advised of her right to counsel and again reminded, by Mr. Sullivan, of her privilege against self-incrimination. What followed was a three-way discussion between Mr. Hannon, Mr. Sullivan, and Mrs. Gross which lasted for some two hours and the contents of which cover 64 pages of transcript. For purposes of this summary, that discussion may be treated as though it were divided in three parts.

(1) Between pages 1-19 of the transcript, it was represented to Mrs. Gross by Mr. Sullivan that he was in possession of certain facts and information which indicated that her morning's sworn testimony was false;^{21/} that information was to the effect that she (Gross) had acted on behalf of Forte and his lawyer in paying certain witnesses, principally Jean Smith, to absent themselves or to lie on the stand in the Forte abortion trial.^{22/} Mrs. Gross denied this, adhering to her previous statements that she didn't "know anything."^{23/} She was told that "the Grand Jury is in a position to be able to deliberate as to whether you committed perjury," and "it might be if it saw fit that the Grand Jury could indict you for perjury."^{24/} In this connection

^{21/} Pages 2-3, transcript of interrogation (word chosen by reporter) of Bernice Gross in Room 3439, United States Attorney's Office, United States Courthouse, Washington, D.C. on March 1, 1963.

^{22/} Same, pages 2-3.

^{23/} Same, pages 2, 6.

^{24/} Same, pages 4, 13.

she was twice told that she was "in the switches"^{25/}. It was explained that her cooperation was needed in ascertaining the truth concerning obstruction of justice in the Forte abortion trial;^{26/} in return for that cooperation nothing could be promised nor could any immunity be conferred;^{27/} however, Mr. Sullivan would ask the Grand Jury to consider her role as a government witness; he would say to the Grand Jury "give us this witness for trial; we need Mrs. Gross; without her we have got nothing; with her we have got something; indict the big fish and let Mrs. Gross be a government witness; without her we have got nothing."^{28/}

Repeatedly Mrs. Gross asked what would happen to her if she told the truth.^{29/} In her own words, "I'm thinking about myself"^{30/} and "that's the only thing I'm interested in and, believe me, I don't care about anybody else."^{31/}

^{25/} Same, pages 6, 9. Mr. Sullivan later explained that by "in the switches" he had meant "that she was just like a train at the switches, she could go one way or she could go the other. She could either choose to tell a lie or she could choose to come forward with the truth" (Mot. Tr. 158-159).

^{26/} Same, pages 2-7.

^{27/} Same, pages 14-17.

^{28/} Same, page 7. To the same effect is page 9.

^{29/} Same, pages 5, 6, 12, 15, 17.

^{30/} Same, page 16.

^{31/} Same, page 11.

It was during this first phase of the interview that Mr. Sullivan first informed Mrs. Gross that, if she cooperated, he would ask her to telephone Forte or Forte's lawyer and to permit the conversation to be overheard on an extension phone. She neither assented to nor resisted the proposal.^{32/}

(2) On page 19 of the transcript, Mrs. Gross agreed to tell the truth. The transition occurred as follows: "Let me say, as long as Jean [Smith] -- as long as Jean told, I'm not going to hold it back. Believe me, she got more than I did. So if she told you, what the hell, it doesn't matter, I'll tell you what you want to know."

(3) Thereafter, between pages 19-64 of the transcript, Gross, responding to questions posed by Sullivan and Hannon, narrated the history of her past contacts with Forte and, to a lesser extent and never in person, with Laughlin. She admitted having received amounts of money from Forte; the money was for Jean Smith to "get her to change her story [about the abortion]".^{33/} Gross herself had "figured" that she would "get taken care of after the trial".^{34/} The subject of money had never come up in her conversations with Laughlin; she had no doubt, however, that Laughlin had known that money was being passed.^{35/}

^{32/} Same, pages 17-18.

^{33/} Same, page 35. And see page 40.

^{34/} Same, pages 35, 36, 39.

^{35/} Same, page 50.

Laughlin had instructed her concerning the letters Jean Smith was to write.^{40/}

Toward the end of this phase of the interview, the following colloquy^{41/} occurred:

MR. HANNON: Is he [Forte] going to call you tonight?

MRS. GROSS: I guess he will.

MR. HANNON: Can we have somebody there?

MRS. GROSS: Sure.

MR. SULLIVAN: You're agreeable to somebody being there?

MRS. GROSS: Yes.

^{40/} Same, pages 52, 55.

^{41/} Same, pages 59-60.

C. Second Grand Jury Appearance of
Bernice Gross on March 1, 1963

On the afternoon of March 1, 1963, Mrs. Gross was recalled as a witness before the Grand Jury. She admitted that her previous testimony, to the effect that she had not been contacted by Forte or anyone in his behalf and had performed no service in connection with the abortion trial, had been false. ^{42/} At the same time she swore to the truth of the statements made by her in Mr. Hannon's office. It was represented to the grand jurors that a transcript of those statements would later be read to them.

^{43/} Before being excused as a witness, the following exchange took place:

BY MR. SULLIVAN:

Q Just before the Grand Jury then, one final thing. You did say, didn't you Mrs. Gross, that since you have come forward and told the truth now you would also be agreeable to having someone listen in on your extension phone tonight should Forte call you?

A The only trouble with that is my husband doesn't know anything about this, and if somebody would have to tell him I --

Q -- I think in fairness I should advise you if this Grand Jury matter results in an indictment of anyone it is going to be public information anyway. The possibility of your husband learning is extremely great. You can think that over yourself as a practical person.

A I still would not like it in my house, I wouldn't.

Q You see, we have no legal way of doing it except in your house?

A Well, I was not going to answer the phone this evening because I don't want to have anymore conversations, and I was going to New York today - that's my home - but I couldn't because I had to come here and

^{42/} Page 2, Transcript of testimony of Bernice Gross before the January 1963 Grand Jury on March 1, 1963, consisting of 7 pages.

^{43/} Same, pages 4-6.

I know I'm going tomorrow. I'm not answering the phone tonight and if he knows I'm here he's just liable not to call.

Q I have no way of forcing the answer from you. It has to be your personal choice.

A I don't.

Q Do you have any objection of making a telephone call to Mr. Forte before leaving Washington and chat with him on the phone, as well as one with James Laughlin and chat with him on the phone.

A I would rather not.

Q I understand that you would rather not, but your cooperation --

A -- If I had to I would, but if I don't have to I would rather not.

Q On the record, let me put this to you, all we want is the truth, you don't have to make those telephone calls?

A I have told you the truth.

Q Fine, but the thing we talked about on the record down in Mr. Hannon's office I'll say it right before the Grand Jury. I said to Mrs. Gross that the big fish behind an operation like this are the ones who are most guilty. The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between, that is the only way to make the case on the big people. We need Mrs. Gross' cooperation, and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation. You would not have to make the telephone call, you see my point?

A I know your point very well. I understand your point very well.

Q Mrs. Gross, you are an experienced policewoman.

A I am, very.

Q You know the point?

A I realize your point but I say I would rather not. If I did not have to I would rather not. If I had to I would. There is nothing I can do.

DEPUTY FOREMAN: Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can.

I think you can tell this witness, and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

MR. SULLIVAN: Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

Thereafter, under the conditions already described, the first of the telephone calls to Laughlin was placed and taped.

D. Testimony of Bernice Gross and
Harold Sullivan Before Judge Hart

Bernice Gross appeared as a government witness at the pre-trial hearing on appellants' motions to suppress evidence and dismiss the indictment. During her direct examination she stated that she hadn't been "willing" to make the telephone calls but rather had done "what I thought was best for myself." (Mot. Tr. 276). Asked to explain further, she responded as follows:

THE WITNESS: Your Honor, when I say I--Mr. Lowther asked me if I was willing. It wasn't my idea to make the phone calls. I didn't want to make them but again I wasn't threatened if I didn't make them, that something would happen to me. I wasn't forced to do them. I felt that I would do-- I was looking out for myself.

* * * * *

BY MR. LOWTHER:

Q Let me ask you this, Mrs. Gross: When you made the phone calls, was it your free choice to make them?

A Oh, yes.

Q All right.

A Yes.

Q And maybe I missed--when I used the word willingly, I'm talking about free choice.

A Free choice, yes.

Q All right, now--

THE COURT: Wait just a moment. Let me ask. When you said that you did not do it willingly, did you mean that it wasn't your idea to make them or that you did not want to make them?

THE WITNESS: No, it wasn't my idea. I didn't come to the office that day to make the phone calls. I had no idea of making them.

THE COURT: And is that what you meant by you were not willing to make them?

THE WITNESS: Yes, that is my interpretation of willing.

THE COURT: All right.

BY MR. LOWTHER:

Q Very well. Now, let me ask you this. In regard to the phone calls, the subsequent ones of March 13th and March 18th, those phone calls, did you make those of your own free choice?

A Yes, I did.

Q All right, now, this question Mrs. Gross.

And for your information the tapes have been heard in chambers today, you have heard them yourself in open court. Are you willing as a party to those phone calls to have those tapes -- provided of course that they were admitted--are you willing to have those tapes played before the Court and jury in this trial here?

A It doesn't matter, yes.

On cross-examination Gross acknowledged that she had previously testified before Judge Youngdahl (in Criminal No. 599-63) that she felt she "had to cooperate" in making the calls to Laughlin (Mot. Tr. 282-283). By that she had meant: "I thought it would be best for me", and "best for me" in turn referred to the possible action the Grand Jury might take in her case (Mot. Tr. 283-284). A desire to escape a perjury indictment was "one of the reasons" for her cooperation in the matter of the telephone calls (Mot. Tr. 285).

Harold Sullivan also was a witness at the pre-trial hearing.

In substance, he testified that he had a conversation with Gross following her second appearance before the Grand Jury on March 1; that he asked her why, having expressed willingness to make the phone calls while in Mr. Hannon's office, she had suddenly become reluctant to do so; that she replied that her husband didn't know about her involvement in the Smith abortion case and that she feared a "domestic problem" if tape recordings were made at her home; and that she was agreeable to having the recordings made at the courthouse "out of the presence of her husband." (Mot. Tr. 124-127).

E. Finding

In this state of the evidence, and after a consideration of the various transcripts alluded to in paragraphs A, B, and C above, the trial judge found that the telephone conversations in issue were overheard with the consent of Bernice Gross (Mot. Tr. 299-303).

The Finding of Consent Was Supported by the
Record and By Applicable Case Law and the
Tape Recordings Were Properly Received in
Evidence

The events of March 1, 1963, were plainly not happy ones for Bernice Gross. It was a day full of hard decisions: whether to testify before the Grand Jury or to exercise her privilege not to; having elected to testify, whether to tell the truth and admit her guilt in a scheme to corruptly influence witnesses or to swear falsely and deny guilt; having lied and been caught at it, whether to cooperate with the government with the prospect of herself becoming an accusing witness or to refuse to cooperate with the prospect of herself being indicted for perjury; having chosen to cooperate, whether to allow telephone conversations with appellant

Laughlin to be overheard and recorded. In each case decision lay between two distasteful alternatives. In an ideal world there would have been no such decisions or at least there would have been some third painless alternative. But not in the intensely real world of March 1. Mrs. Gross, a former policewoman, was deeply aware of these realities and dealt with them according to the dictates of a single practical precept. Again and again she wanted to know "what's going to happen to me." Self-interest was her paramount and overriding concern and the mainspring of her decisions. Clearly it was more to her advantage to cooperate in telling the truth than to persist in her perjury, when the latter course of action might lead to her own indictment. And if that cooperation encompassed making telephone calls to a partner in crime and permitting them to be overheard, nevertheless this was preferable to hazarding the other consequences of her wrongdoing. It is true that Mrs. Gross didn't volunteer to make the calls and in that sense was "unwilling" to do so. It is also true that she felt she "had to" make the calls in the sense that the logic of self-interest left her no other acceptable choice. Yet an act may be 'voluntary' without being volunteered; a choice which is disagreeable to make may nevertheless be a free one. Common experience tells us so. Having to pay taxes is unpleasant but being prosecuted for failure to do so is worse. Is the decision to pay therefore involuntary?

The situation would be altogether different had the cooperation of Bernice Gross been procured by illegal or improper conduct on the part of the Grand Jury or government officials. But it was not. The Grand Jury had a right to investigate charges of obstruction of justice. Mr. Sullivan had a right to ask material questions in connection with that investigation.

Certainly neither the Grand Jury nor Mr. Sullivan can be held responsible in any meaningful way for the false testimony of Mrs. Gross. Moreover, having probable knowledge that Gross had perjured herself, Mr. Sullivan had an unassailable right to confront her with the evidence in his possession and to seek her cooperation. The fact that it was in her best interests to offer that cooperation cannot be charged to any overreaching on the part of the Government. Indeed the government acted at all times with a scrupulous attention and regard for the rights of Mrs. Gross.

The consent of Bernice Gross is not vitiated by the fact that the idea of making telephone calls to Laughlin did not originate with her, but rather was initiated by Federal officials. "Government agents may create an opportunity for lawful eavesdropping and need not rely on accidental or natural opportunity." Ferguson v. United States, supra, 307 F.2d at 789; Anspach v. United States, 305 F.2d 48 (10th Cir.), cert. denied, 371 U.S. 826 (1962). In numerous cases where the contents of an overheard conversation were received in evidence, appellate courts have validated the consent of one of the parties where that consent was obtained in circumstances analagous to those disclosed by this record.

In Ladrey v. Commission on Licensure To Practice, Etc., 104 U.S. App. D.C. 230, ²⁶¹/F.2d 68 (1958 en banc), a telephone call was placed at police headquarters from one Matthews to appellant. "As Matthews knew" the conversation was overheard by a detective on an extension telephone. "Matthews told the appellant he had been questioned throughout the entire day by the police and that he was scared." At trial the detective was

permitted to relate the details of the conversation, as well as those of a second call placed in the same manner. Admission of the evidence was sustained on appeal over appellant's claim that "Matthews "'acquiescence' to Gosman's listening can hardly be equated with 'authorizing' him to listen." This Court said:

"We must reject his contention. No one is bound to answer a ringing telephone. If he does pick up the receiver, he is not required to talk to the outside caller. If he chooses to talk, he may well understand that the calling party, the original "sender," may have others listening to the conversation, whether in a group around the caller's telephone or on an extension attached to it. Quite apart from any such observations, the Supreme Court has passed upon the point⁴⁴, adversely to appellant's claim.

In Flanders v. United States, supra, narcotics agents listened on an extension phone to a conversation between one Merritt and appellant. Merritt had previously been arrested for a narcotics violation and was "pre-vailed upon" by the agents to place the call. The receipt of the agents' testimony concerning the conversation was upheld.

⁴⁴/ Citing Rathbun v. United States, supra, where the Supreme Court said that "one party may not force the other to secrecy merely by using a telephone." 355 U.S. at 110. "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation." 355 U.S. at 111.

In United States v. Bookie, supra, officers entered one Hubbard's store and arrested him for possession of narcotics. Before leaving they heard the telephone ring. At the officers' direction, Hubbard answered, holding the receiver in such a position that one of the officers could overhear the incoming conversation. No violation of Section 605 was found. And for another case in which the monitored call was placed by a person under arrest, see United States v. Pierce, supra. See also Wilson v. United States, supra, United States v. Williams, supra, and Ferguson v. United States, supra, for cases in which the monitored call was placed by a government informant or special employee.

Most recently, in McClure v. United States, 332 F.2d 19 (9th Cir. 1964), narcotic agents "procured the services" of one Hopping, a known addict who had been arrested for a narcotics violation in 1962. They promised to ask the United States Attorney that he not be prosecuted if he cooperated in making a telephone call to appellant. He did so, and the officers overheard the conversation on a "twin-phone". The Court found that Hopping's consent was freely given and therefore held that no statutory violation had occurred.

Matched against the circumstances which gave rise to consent in the above cases, the circumstances in the instant case sufficiently supported the finding that the telephone calls which Bernice Gross made to appellant Laughlin were overheard with her consent.

Weiss v. United States, 308 U.S. 321 (1939), so heavily relied on by appellant, does not require that the finding of consent be overturned. There the telephone wires leading to appellant's offices were tapped for a

period of months, and the intercepted messages were recorded. Prior to trial these recordings were made available to government agents and United States Attorneys. Upon being confronted with the recordings, many of the defendants charged in a mail fraud indictment pleaded guilty, became government witnesses, and were allowed to read transcripts of the taped conversations to the jury at trial. The Supreme Court, stating that "[t]he Act contemplates voluntary consent and not enforced agreement to publication," held that Section 605 was violated since the pre-trial divulgence of the recordings was not consented to by either of the parties to any of the conversations. 308 U.S. at 330. Obviously the Court was dealing with the question of divulgence of intercepted messages. Its holding has little or no bearing on the separate question, here involved, of whether a message has been intercepted at all.

Implicit in the Weiss decision is the recognition that a telephone communication, even though intercepted within the meaning of Section 605, may nevertheless be lawfully divulged if one of the parties consents. ^{45/} Cf. McClure v. United States, supra, 332 F.2d at 22. Assuming arguendo, therefore, that the conversations between Gross and Laughlin were 'intercepted', their contents were nevertheless admissible since Gross voluntarily consented to their divulgence at trial (Mot. Tr. 278).

Appellee well recognizes that the law sometimes raises a presumption against consent, as for example where it is sought to justify an otherwise unreasonable search on the basis of consent to search given by a defendant

^{45/} The question whether Section 605 is violated if a message is intercepted but not divulged was reserved in Rathbun v. United States, supra, 355 U.S. at 108, n.3.

in custody. Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649 (1951). Operating to create the presumption in such cases, however, in the well-known inference against the waiver of constitutional rights as well as the logical inference that a person having nothing to gain from the seizure of evidence against him would not consent to a search for such evidence. These considerations are obviously not present in the instant case. No constitutional rights, certainly not any inhering in appellant Laughlin, were involved. Moreover, Bernice Gross had very good reasons, apparent on the face of this record, to consent in the matter of the telephone calls. The rationale of the Fourth Amendment consent cases, wholly inapplicable to these facts, should not be imported to strike down the reliable and probative evidence secured through the cooperation of Bernice Gross.

Eavesdropping in any form carries with it the stigma of impoliteness and is not "cricket" in the realm of social intercourse. But the prevention and detection of crime is not a polite business and we see no need or justification for reading into the Fourth Amendment a standard of conduct for law enforcement officials which would leave society at the mercy of those dedicated to the destruction of the very freedoms guaranteed by the Constitution. Anspach v. United States, supra, 305 F.2d at 51.

III. The doctrine of collateral estoppel did not preclude the government from litigating the question of whether Laughlin's telephone conversations were overheard and recorded with the consent of Bernice Gross

It has been seen in Argument II, supra, that the admissibility of the tape recordings was contingent upon a finding of consent on the part of Bernice Gross. Appellant Laughlin contends that the doctrine of collateral estoppel operated to preclude such a finding. Evaluation of this contention, with which appellee disagrees, necessarily involves a review of the prior judicial proceedings on which it is based.

Proceedings before Judge Youngdahl in Criminal No. 599-63

Trial in Criminal No. 599-63, in which appellant Laughlin was charged with perjury, began on October 1, 1963. At the outset of trial the government indicated that it intended to offer in evidence tape recordings of telephone conversations between Gross and Laughlin. (These were the same recordings which are involved in the present appeal.) After a hearing at which the only testimony presented was that of Assistant United States Attorney Harold Sullivan, Judge Youngdahl found that the recordings

^{46/} Bernice Gross was not called as a witness by the government and Laughlin presented no testimony. At the time of this hearing, however, Judge Youngdahl made a request for the relevant grand jury transcripts (p. 4, transcript of proceedings before Judge Youngdahl in Criminal No. 599-63 on October 2, 1963).

had been made with the voluntary authorization of Bernice Gross and were therefore admissible. Thereafter the tapes were played to the jury during the direct examination of Bernice Gross.

When asked for the first time during cross-examination whether the recordings had been made with her consent, Gross replied: "I felt I had to cooperate."^{47/} At this point a second hearing on the question of consent was held out of the presence of the jury. Testimony taken from Bernice Gross at that hearing covers six (6) pages of transcript.^{48/} On the basis of that testimony and after a reading of the transcript of the 'interrogation' of Bernice Gross in Mr. Hannon's office and of the testimony given by her at her second appearance before the grand jury on March 1, 1963, Judge Youngdahl concluded that Mrs. Gross' agreement to the recordings had been induced by an implied promise of leniency. He further concluded that such agreement under these circumstances was not the "voluntary consent" contemplated by the Communications Act, relying on Weiss v. United States, supra. Reversing his previous decision, Judge Youngdahl ruled the tapes inadmissible and, rejecting the idea that the jury be instructed to disregard them, declared a mistrial. His opinion is reported at 222 F. Supp. 264.

^{47/} Page 160, transcript of proceedings before Judge Youngdahl on October 7, 1963.

^{48/} Pages 161-162, 170-174, same transcript.

Proceedings before Judge Curran in Criminal No. 599-63

On October 30, 1963, Laughlin filed a motion to dismiss the indictment in Criminal No. 599-63. The identical motion was made in Criminal No. 600-63. The motions stated that the indictments should be dismissed "for the reason that there was no competent and credible evidence before the Grand Jury on which to base an indictment." Argument was made in the motions that Judge Youngdahl's ruling was the law of the case as to the admissibility of the tape recordings, and in an attached affidavit Laughlin set forth portions of the "interrogation" of Bernice Gross in Mr. Hannon's office on March 1, 1963, and portions of the proceedings before Judge Youngdahl. On October 30, 1963, Laughlin also filed, in both Criminal Nos. 599-63 and 600-63, a motion to impound the tape recordings.

On October 31, 1963, the government filed, in both 599-63 and 600-63, an opposition to appellant's motion to impound the tapes. It alleged therein that there were matters on the tapes which had no connection with the pending indictments. On October 31, 1963, the government also filed, in both 599-63 and 600-63, its opposition to appellant's motions to dismiss the indictments therein. The government argued in its opposition that there was competent evidence before the grand jury, to wit, the testimony of Bernice Gross and telephone records showing person-to-person and station-to-station calls between Gross and Laughlin. For this reason, it

was urged, even assuming arguendo that tainted and unlawful evidence had been before the grand jury, the indictment should nevertheless not be dismissed. Attached to the opposition was an affidavit of Harold Sullivan concerning the evidence which had been before the grand jury.

On November 1, 1963, Laughlin's motions were argued before Judge Curran. No testimony was taken in connection with these motions.

On November 8, 1963, the government filed, in both 599-63 and 600-63, a supplemental opposition to the motions to dismiss. It therein set forth that the review of the transcripts of the grand jury testimony of Bernice Gross, Jean Smith, and Dorothy Birge would establish that competent evidence had been before the grand jury.

On November 13, 1963, Judge Curran decided the motions in an opinion reported at 223 F.2d 623. In that opinion Curran reiterated the facts, as they appeared in the opinion of Judge Youngdahl, relevant to the issue of whether Bernice Gross had consented to the recording of her conversations with Laughlin. 223 F.2d at 624-625. He concurred in Judge Youngdahl's conclusion that Gross had not given her voluntary consent within the meaning of the Communications Act, also relying on Weiss v. United States, supra. He held that, excluding the tape recordings, there was otherwise insufficient evidence to support the perjury indictment (599-63), and he therefore ordered it dismissed. At the same time he denied the motion to

dismiss 600-63 and denied the motion to impound the tapes. 223 F.2d at 626.

The government filed a motion to reconsider and vacate the order of November 13. It urged therein that, even excluding the recordings, there was sufficient corroborative evidence of perjury and, in the alternative, that the court had erroneously applied a trial rule of evidence in dismissing the indictment. Judge rejected both contentions. United States v. Laughlin, 226 F.Supp. 112 (D.D.C. 1964).

An appeal noted by the government from the dismissal of the indictment in 599-63 was dismissed on motion of the government on April 8, 1964.

Such was the extent and nature of the relevant prior judicial proceedings when this case, Criminal No. 600-63, reached Judge Hart for trial on April 14, 1964. First order of business before Judge Hart was disposition of appellants' motion to suppress evidence, filed April 1, 1964, wherein they asked that a full evidentiary hearing be held which, so the motion alleged, would clearly show: "A. That the evidence received by the Grand Jury in this cause was in violation of the Federal Communications Act."

Neither the determination of Judge Youngdahl nor the determination of Judge Curran was conclusive or the question whether Bernice Gross consented to the recordings.

The doctrine of collateral estoppel is of course fully applicable to/ criminal proceedings. Sealfon v. United States, 332 U.S. 575 (1948). It is not, however, applicable in the circumstances disclosed by this record. This may be clearly perceived by considering separately the prior judicial determinations of Judges Youngdahl and Curran.

Judge Youngdahl's declaration of a mistrial in Criminal No. 599-63 was a non-final, non-appealable order. It was interlocutory in character and therefore had no collateral consequences whatever. The rule involved, that an interlocutory ruling rendered during the course of a criminal proceeding has no preclusive collateral affects, is most often expressed in connection with motions to suppress evidence. United States v. Wallace and Tiernan Co., 336 U.S. 793, 802 (1949)("[A] decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case."); Homan Manufacturing Co. v. Russo, 233 F.2d 547, 549-550 (7th Cir. 1956); United States v. Physic, 175 F.2d 338, 339 (2d Cir. 1949); United States v. One 1946 Plymouth Sedan Automobile, 167 F.2d 3, 8 (7th Cir. 1948)("a proceeding to suppress is not the basis of judgment when brought after indictment as part of the criminal proceeding. It is only a procedural step involving the admissibility of evidence in the criminal proceeding. It decides only that motion. It is interlocutory and not appealable."). The conclusion reached in each of these cases is that orders

either granting or denying motions to suppress evidence are not determinative of the legality of or of the facts surrounding the method of obtaining the evidence. A like conclusion is required here. The order declaring a mistrial was interlocutory only and thus insufficient to preclude the government from disproving the facts as Judge Youngdahl found them to be.

Judge Curran's order dismissing the indictment in Criminal No. 599-63 stands on a different footing. It was a final, appealable judgment and as such was conclusive between the parties as to all matters actually litigated therein and necessarily determined thereby.

"In an estoppel situation "the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action." Tait v. Western Maryland Ry. Co., 289 U.S. 620, 623 (1933)

"(a) judgment operates as an estoppel only as to matters in issue . . . and actually determined in the original suit." Troxell v. Delaware, Lackawanna & Western R.R. Co., 227 U.S. 434, 440 (1931).

"[T]he inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been litigated and determined. Only upon such matters in the judgment conclusive in another action." United States v. International Building Company, 345 U.S. 502, 505 (1953)

"That doctrine [collateral estoppel] makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision. Yates v. United States, 354 U.S. 298, 336 (1951), and cases there cited.

Moreover, before a fact or issue will be concluded, it is necessary that the record of the former suit "show with certainty" that that fact or issue was

"indeed litigated and decided on the merits." Kelliher v. Stone & Webster, 75 F.2d 331, 333 (5th Cir. 1951). "It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment." De Sollar v. Hanscome, 158 U.S. 216, 221 (1895).

Applying these principles to the instant case, it is apparent that the question of Gross' consent in the matter of ^{the} tape recordings was not put in issue before Judge Curran and was neither litigated nor determined by him. (1) That the question was not put in issue may be seen from the pleadings, the only issue joined on those pleadings was whether, assuming the tape recordings to be inadmissible, there was sufficient competent evidence to support the indictment. Certainly Laughlin, who in his motion argued law of the case as to the tapes, was not seeking to place their admissibility in issue. (2) That the matter was not litigated may be seen from the absence of an evidentiary hearing. Judge Curran had before him solely a question of law. He could not deprive the government of its right to disprove the facts found by Judge Youngdahl simply by adopting those facts in his opinion. (3) That the question of consent was not conclusively determined is apparent from the fact that such a determination was not essential to the judgment; Judge Curran had only to decide whether, assuming there was no consent and the tapes were excludable, the indictment should be dismissed.

Still other reasons argue against an estoppel by judgment on the issue of consent. "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts

in issue in the subsequent proceeding." Yates v. United States, supra, 354 U.S. at 338. The consent of Bernice Gross was obviously not an ultimate fact in Criminal 600-63. It was evidentiary fact only, as to which the doctrine of collateral estoppel is inoperative. Yates v. United States, supra; The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944). Finally, the intent of Judge Curran to limit the effect of his order to Criminal No. 599-63 may be inferred from his denials of Laughlin's motions to dismiss the indictment in Criminal No. 600-63 and to impound the tapes.

IV. None of the evidence tending to establish the existence of a conspiracy or appellants' participation therein was objectionable as hearsay.

(See Tr. 261, 302, 1153-1154)

Appellants devote much space (Br. 37-55) to their argument that the case against them consisted of inadmissible hearsay evidence which should have been excluded. That argument proceeds as follows: (1) that since Gross was named as a co-conspirator, her testimony against them was inadmissible in its entirety according to the evidentiary rule that post-conspiracy statements are admissible against the declarant only; (2) that since Mrs. Gross was a co-conspirator, hearsay declarations made by her during and in furtherance of the conspiracy were admissible against them only if there was independent evidence of their participation in that conspiracy; that there was no such independent evidence and that Gross' hearsay declarations, as given in evidence by Jean Smith, were inadmissible in their entirety; (3) that Laughlin's post-conspiracy statements (the tapes) were not admissible against him. In essence what appellants contend is that all the evidence against them should have been excluded. No more specious argument can be imagined.

The live testimony of Bernice Gross

It is quite true that post-conspiracy statements are admissible against the declarant only. Delli Paoli v. United States, 352 U.S. 232, 237 (1957); Krulewitch v. United States, 336 U.S. 440 (1949). The reason for the rule is that the agency existing among the co-conspirators ends with the conspiracy. Since each co-conspirator is thereafter without authority

to speak for the others, he is likewise powerless to make any statements admissible against the others under an exception to the hearsay rule. Lutwak v. United States, 344 U.S. 604 (1953). It is perfectly obvious that the rule is not a bar to the reception of live courtroom testimony by one co-conspirator against the others. Such testimony is not hearsay and its admission does not depend on any theory of agency or exception to the hearsay rule.

Appellants seemingly make the additional argument (Br. 40-54) that the incriminating admissions made by Mrs. Gross before the Grand Jury and in Mr. Hannon's office on March 1, 1963, were inadmissible against them. Perhaps so,^{47/} but the point is hypothetical because these admissions were no part of the government's evidence at trial.

The testimony of Jean Smith

Much of Smith's testimony related to her conversations with the co-conspirator Gross in which appellants were implicated in the conspiracy. Appellants argue (Br. 39) that this testimony should have been excluded because there was no substantial evidence tending to establish their participation in the conspiracy.

Again appellants move from a valid premise to an absurd conclusion. It is true that a conspirator can only be convicted upon substantial proof of his own words and deeds and not alone upon hearsay declarations of a co-conspirator. Glasser v. United States, 315 U.S. 60, 75 (1942); United

^{47/} Had these prior admissions been offered, they would perhaps have been objectionable as prior consistent statements of the witness Gross but not, as appellants suggest, as post-conspiracy statements.

Stanes v. Russano, 25 F.2d 712, 713 (2d Cir. 1958). Here, however, appellants' conviction did not rest on Gross' hearsay declarations. They rested on her live testimony in court which, if believed, was sufficient to establish their guilt beyond any doubt whatever.

The post-conspiracy statements of appellant Laughlin

Twice during the trial the jury was instructed that any statements made by one defendant after the conspiracy had ended were admissible only against the declarant, only in the event a conspiracy was found to have existed, and only for the limited purpose of connecting that declarant with the conspiracy (Tr. 261, 302). The first of these instructions related specifically to the taped post-conspiracy telephone conversations between Gross and Laughlin. Included in the final charge to the jury was the following instruction (Tr. 1153-1154):

This Court admitted in evidence certain tape recordings of alleged telephone calls between Bernice Gross and defendant Laughlin on March 1, March 13 and March 18, 1963, the same covering a period of time after the alleged conspiracy ended.

I caution you again that this evidence, being Government's Exhibits 11, 12 and 13, is not admissible and may not be considered by you in any way against the defendant Forte. This evidence may be considered against the defendant Laughlin only, and then only for the purpose of connecting Laughlin with the conspiracy if you should find that one had been entered into.

Further, I instruct you that this particular evidence is not to be considered on the question of whether or not the conspiracy existed but only as bearing on the question of whether the defendant Laughlin was a part of any conspiracy that may have previously existed as alleged in the indictment if you find from other evidence adduced in the case that such conspiracy in fact existed.

To appellant Laughlin's claim that the instruction was erroneous, it need only be said that the law is otherwise. Delli Paoli v. United States, supra, 352 U.S. at 237; Lutwak v. United States, supra, 344 U.S. at 618.

V. Appellants' motions to dismiss the indictment were properly denied.

(See Mot. Tr. 29, 212, 214-214,
Tr. 314, 544, 549, 582, 598-599,
604-605)

In addition to the motion to dismiss the indictments in both Criminal No. 599-63 (the perjury case) and Criminal No. 600-63 (this case), filed on October 30, 1963, and denied by Judge Curran as to this case, United States v. Laughlin, supra, 223 F.Supp. at 626, appellants made two motions to dismiss the present indictment. The first of these, alleging bias on the part of the grand jury, was filed on April 1, heard on April 14-15, and denied on April 15, 1964 (Tr. 314). The other, alleging abuse of grand jury process by the government, was filed during trial on April 22, 1964, and denied after hearing the same day (Tr. 604-605). Appellants now urge (Br. 102-116) that both motions should have been granted and, in the conclusion of their brief, ask that the case be reversed with instructions to dismiss the indictment. Appellee submits that both motions to dismiss were without a particle of substance.

The motion of April 1, 1964, alleging grand jury prejudice

Both at the pre-trial hearing on this motion and now on appeal appellants have relied on the following facts in support of their allegation that the indictment was returned by a biased grand jury: that on March 26, 1963, Detective Samuel Wallace^{48/} appeared as a witness before the grand jury

^{48/} With respect to Wallace, appellants urge (Br. 117-119) the additional point of error that the trial court violated the 'rule of completeness' in excluding various attempted references to him. They misconstrue the rule. "The general phrasing of the principle, then, is that when any part of an
(Continued next page)

and was asked by Assistant United States Attorney Harold Sullivan whether "as a result of certain information which came to the attention of the United States Attorney from Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin that Jean Smith of the Baltimore area had a record or a reputation as a call girl or prostitute?"^{49/} that Wallace replied that he had checked out the story and had ascertained that Jean Smith's police record consisted of one drunk and disorderly charge in early 1962.^{50/} that before Wallace was excused as a witness one of the grand jurors remarked: "Mr. Laughlin seems to be throwing around an awful lot of accusations."^{51/} that one of the grand jurors also remarked: "This man Laughlin has made a charge."^{52/} that during this same session one of the grand jurors commented: "I think we should be awfully careful before we get into the record any aspersions or any innuendoes, because I think this Grand Jury wants to hold this testimony on a little higher standard than Jim Laughlin's concept of trying a law case."^{53/} that, while appearing as a witness in his own behalf at the pre-

^{48/} continued from previous page.

oral statement has been put in evidence by one party, the opponent may afterwards (on cross-examination or re-examination) put in the remainder of what was said on the same subject at the same time." 7 Wigmore, Evidence §2115 (3d ed. 1940). (Emphasis supplied). In no instance was this rule violated as to Wallace.

^{49/} Page 27, transcript of testimony of Samuel Wallace, Joyce Johnson, and Theodore Johnson before the January 1963 Grand Jury on March 26, 1963.

^{50/} Same, pages 27-28.

^{51/} Same, page 28.

^{52/} Same, page 29.

^{53/} Same, page 30.

trial hearing on the motion to dismiss, Laughlin testified: "At no time did I represent to Mr. Sullivan that I had information to the effect that she (Jean Smith) was a call girl." (Mot. Tr. 29).

The inference most favorable to Laughlin which may be drawn from these facts is that Mr. Sullivan made deliberately false statements concerning him before the grand jury. In this posture of the case, however, Laughlin is not entitled to the benefit of that unlikely inference.^{54/} Mr. Sullivan testified at the hearing that he had in fact received "information of a derogatory nature on Jean Smith, that she was a prostitute," and that Laughlin was the source of that information.^{55/} (Mot. Tr. 212, 214-215). That being true (and the trial court was in a position to determine credibility) Mr. Sullivan had a clear right to attempt a verification of that information and place his findings before the grand jury. "He (the Assistant United States Attorney) had power to give them (the grand jury) any documents and make any oral communications that he thought pertinent in the investigation of any crimes which the grand jury or he believed might have been committed . . ." United States v. Smyth, 104 F.Supp. 283, 306 (N.D. Cal. 1952). "A grand jury that begins the investigation of what may be found to be obstructions of justice opens up all the ramifications of the particular field of inquiry." United States v. Johnson, 319 U.S. 503, 510

^{54/} Appellee thus passes the question whether, even if it could be shown that the grand jury was influenced by government-instigated prejudice, the indictment would fall. Gorin v. United States, 313 F.2d 641, 645 (1st Cir. 1963), suggests that an indictment is not subject to attack on this ground. So does United States v. Smyth, supra, 104 F.Supp. at 301.

^{55/} Appellants mistakenly state in their brief (Br. 106) that Laughlin's testimony in this matter was uncontradicted.

(1943). And see generally, for the power of a federal grand jury to seek and obtain information from any source, including an Assistant United States Attorney, Hale v. Henkel, 201 U.S. 43, 63-65 (1906); United States v. Smyth, supra; Orfield, The Federal Grand Jury, 22 F.R.D. 343, 431-432 (1959).

The motion of April 22, 1964, alleging abuse of grand jury process by the government

During cross-examination, Bernice Gross stated that, at the request of Mr. Sullivan, she had come without subpoena to the District of Columbia in March, 1964, and had appeared before a grand jury (Tr. 544, 549). Soon forthcoming was appellants' motion to dismiss the indictment (Tr. 582). It alleged, in substance, that the grand jury had been improperly used as an instrument of discovery to prepare the present case for trial. A hearing followed, at which Mr. Sullivan testified that the appearance of Gross before the grand jury in March, 1964, was in connection with an investigation of possible charges of perjury against Laughlin^{56/} (Tr. 598-599). The trial judge read the transcript of Gross' testimony before the grand jury in March, 1964.^{57/} He found that this grand jury was not "being used for the sole or dominating purpose of preparing the indictment in the case

^{56/} It appears that the perjury charges being considered were the same as those contained in the indictment (Criminal No. 599-63) dismissed by Judge Curran in 1963. United States v. Laughlin, supra, 223 F.Supp. 623. Of course the dismissal in Criminal No. 599-63 was no bar to reindictment in that case. Robinson v. United States, 284 F.2d 775 (5th Cir. 1950); Nolan v. United States, 163 F.2d 768 (8th Cir. 1947); Amrine v. Tines, 131 F.2d 827, 834 (10th Cir. 1942).

^{57/} Transcript of testimony of Bernice Gross before Grand Jury on March 19, 1964.

at bar for trial" and therefore denied the motion to dismiss (Tr. 604-605). His action in this regard was unquestionably correct. United States v. Dardi, 330 F.2d 316, 329 (1964); In Re Grand Jury Investigation (General Motors Corp.), 32 F.R.D. 175 (S.D. N.Y. 1963); United States v. Pack, 150 F.Supp. 262 (D. Del. 1957). Moreover, even if it be found that the sole purpose of a grand jury investigation is to gather evidence for use in a pending case, the proper judicial course of action is to restrain the investigation, not to dismiss the pending indictment. In Re Grand Jury Investigation, supra, 32 F.R.D. at 183; United States v. Pack, supra, 150 F.Supp. at 264.

CONCLUSION

Appellants complain that the trial of this case was marked by fundamental unfairness. We believe a careful reading of the record will establish exactly the opposite to be true.

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

/s/ DAVID C. ACHESON
DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

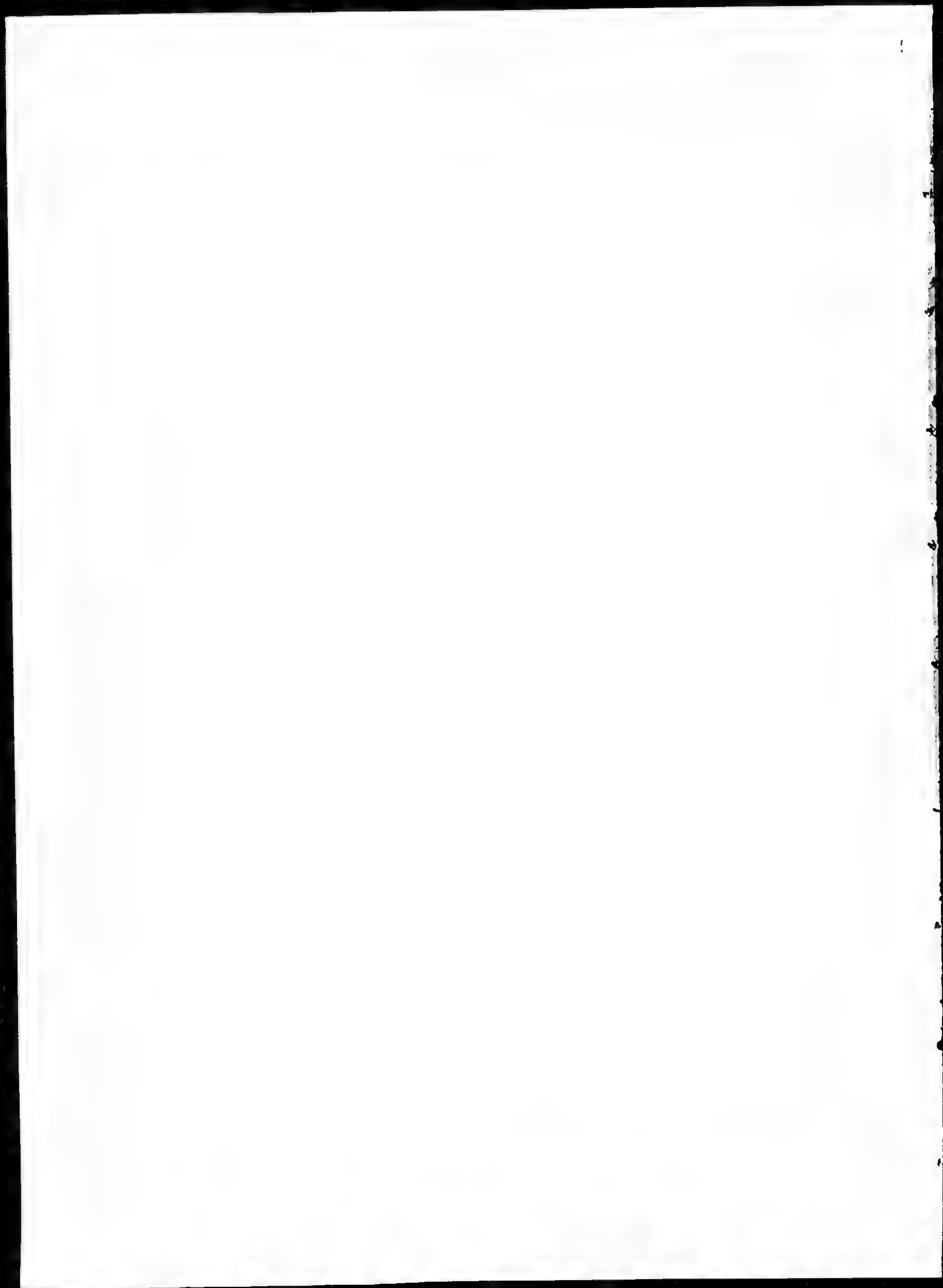
/s/ JOSEPH A. LOWTHER
JOSEPH A. LOWTHER
Assistant United States Attorney

/s/ ANTHONY A. LAPHAM
ANTHONY A. LAPHAM
Assistant United States Attorney

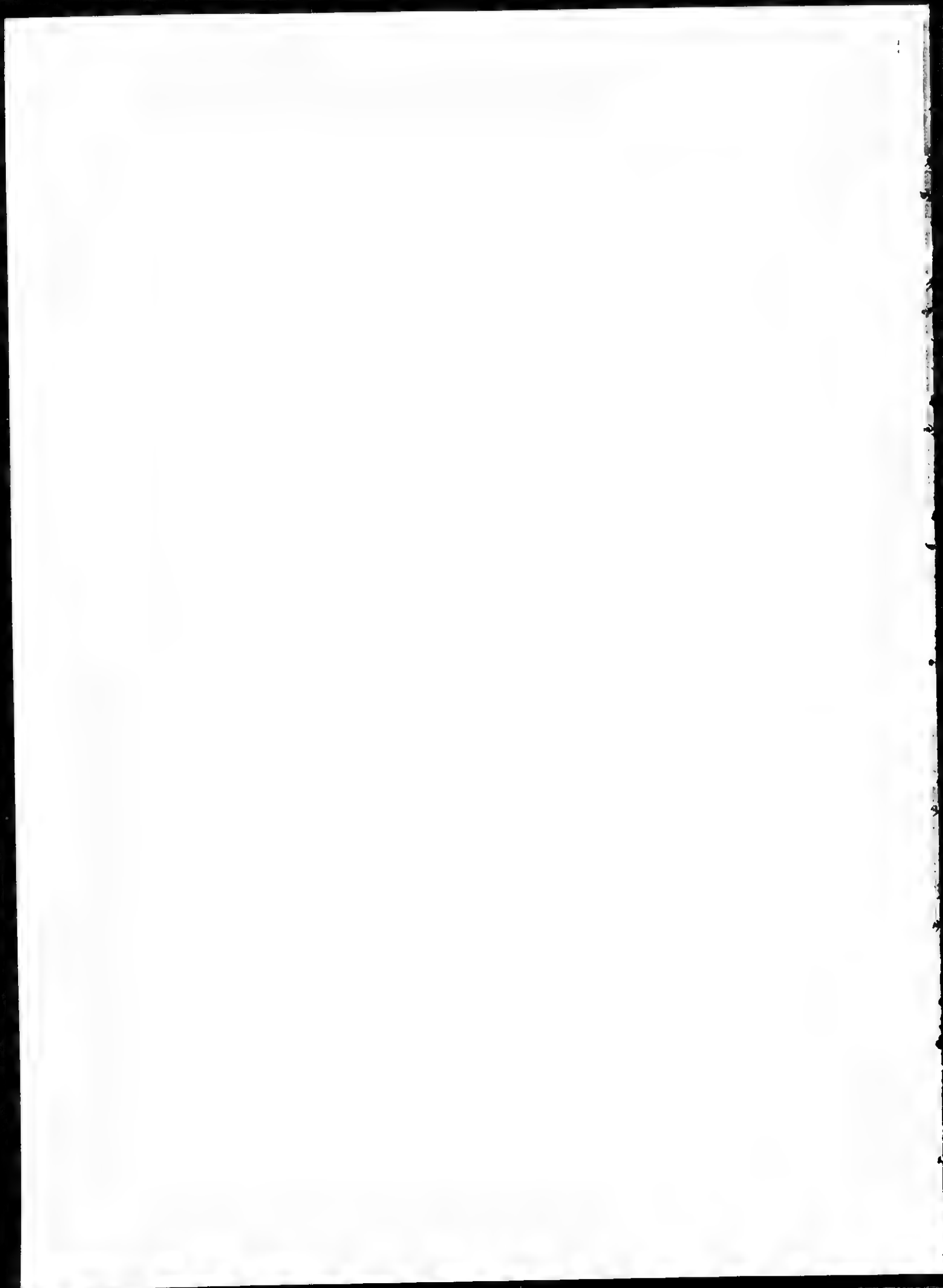
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Mimeographed Brief has been served on attorneys for appellants, William J. Garber, Esq., 411 412 - 5th Street, N.W., Washington, D. C., 20001, and James J. Laughlin, Esq., National Press Building, 1346 F Street, N.W., Washington, D. C., 20001, this 10th day of October, 1964.

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney



A P P E N D I C E S



APPENDIX A.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Washington 1, D.C.

Chambers of
Matthew F. McGuire
Chief Judge

April 6, 1964

MEMORANDUM

By agreement of the Judges involved they will rotate their regular assignment for the months of April, May and June as follows:

April

Motions No. 2	Judge Jones
Criminal No. 5	Judge Hart
Civil Jury No. 4	Judge Walsh

May

Motions No. 2	Judge Walsh
Criminal No. 5	Judge Jones
Civil Jury No. 4	Judge Hart

June

Motions No. 2	Judge Hart
Criminal No. 5	Judge Jones
Civil Jury No. 4	Judge Walsh

/s/ Matthew F. McGuire
Chief Judge

APPENDIX B

COURTROOM LOG OF JUDGE HART
Court-month: April, 1964

- April 7 Beg n sitting in Criminal as per Memorandum of April 6, 1964,
 from Chief Judge McGuire relative to Assignments.
- U. S. v. Taylor, Cr. No. 1228-63. Trial begins. (Forgery
 & Uttering)
- April 8 U. S. v. Taylor (Continued)
 Defendant plead guilty to False Pretenses; Jury dismissed.
- U. S. v. Boddie, Cr. No. 132-64. Trial begins.
 (Housebreaking & Larceny)
- April 9 U. S. v. Boddie (Continued)
 Jury returns verdict of guilty.
- April 10 Sentences; Motions in Criminal cases
 (See Appendix A)
- April 13 U. S. v. Edward T. Carter and Norman F. Carter
 Cr. No. 143-64 (Robbery). Trial begins.
- April 14 U. S. v. Carter, et al (Continued)
 Jury returns verdict of not guilty as to Edward T. Carter;
 guilty as to Norman F. Carter.
- U. S. v. Laughlin and Forte, Cr. No. 600-63
 (Conspiracy, influencing witness). Sent for trial.
 Motion to dismiss; to suppress evidence pending;
 Hearing begun on Motions.
- April 15 U. S. v. Laughlin and Forte (Continued)
 Motion to dismiss, to suppress evidence - denied.
- April 16 U. S. v. Laughlin and Forte (Continued)
 Affidavit of prejudice filed and denied.
 Jury sworn.
- April 17 U. S. v. Cobb, Cr. No. 1049-63
 Mental Competency Hearing.

U. S. v. Harold Parker, Cr. No. 113-64
Motion for Judgment N.O.V.; new trial.

U. S. v. Laughlin and Forte - Trial continues.

April 20)
21, 22)
23)

U. S. v. Laughlin and Forte - Trial continues.

April 24 U. S. v. Curtis H. Desmond, Cr. No. 169-64
Sentence.

U. S. v. Laughlin and Forte - Trial continues.

April 27) U. S. v. Laughlin and Forte - Trial continues;
28, 29) Jury returns verdict of guilty.

April 30 In Chambers.

May 1 U. S. v. Harold Parker, Cr. No. 113-64
Sentence.

U. S. v. Owens, Cr. No. 125-64
Motion for Mental Examination.

U. S. v. Eldridge, Cr. No. 183-64 (Robbery)
Trial begins.

May 4 U. S. v. Eldridge - Trial continues;
Jury returns verdict of guilty.

May 5 Begin sitting Civil Jury as per Memorandum of
April 6, 1964, from Chief Judge McGuire, relative
to Assignments.

Courtroom log of Judge Hart, April, 1964

APPENDIX A (of Appendix B)

Judge Hart

April 10, 1964
at 10:00 A. M.

SENTENCES

33-64	George F. Brandau	Treanor	Thomas R. Jones	Jail
611-63	Raymond F. Lein (Hearing on violation of probation.)	Lindemann	Paul R. Kramer	Jail

MOTIONS

150-64	Ora F. Moore (Motion to dismiss indictment & affidavit in support of application for leave to proceed without prepayment of costs.) (By Deft.)	Sullivan	Al Phillip Kane	Jail
220-64	Everett K. White (Motion for relief from prejudicial joinder.)	Reznek	Addison Bowman	Bond
135-64	Walter E. Lewis (Motion to suppress evidence.)	Sullivan	Stanley M. Dietz	Bond
164-64	Leon I. Williford Howard S. Smith (Motion to suppress evidence.)	Perry	Gordon J. Quist Bernard M. Dworski	P. Bond Jail
162-64	Curtis H. Desmond (Motion to suppress.)	Sidman	Paul E. Miller	Jail
50-64	(Roland F. Veney, Jr. (Motion to suppress evidence.) (Howard R. Baylor (Motion for suppression of evidence and motion for separate trial.) (By Deft.) (Motion to suppress evidence.)	Lowther	Eugene E. Siler Robert H.S. French	Jail Jail
51-64	(Roland F. Veney, Jr. (Motion to suppress evidence.)	Lowther	Eugene E. Siler	Jail

Judge Hart - page 2

43-64

Louis M. Ray

Edelhertz

Sidney S. Sachs

P. Bond

(Motion for bill of particulars.

James D. Sparks

Motion for discovery.

Motion to dismiss indictment obtained
in violation of Defts. constitutional
rights.

Motion to dismiss counts 2 and 3.

Motion to transfer.

Motion for return of seized property
and suppression of evidence.)

BRIEF FOR APPELLEE AND APPENDICES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,711

JAMES J. LAUGHLIN, APPELLANT.

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 18,712

ALLAN U. FORTE, APPELLANT.

v.

UNITED STATES OF AMERICA, APPELLEE.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

United States Court of Appeals

DAVID C. ACHESON,

United States Attorney.

FRANK Q. NEBEKER,

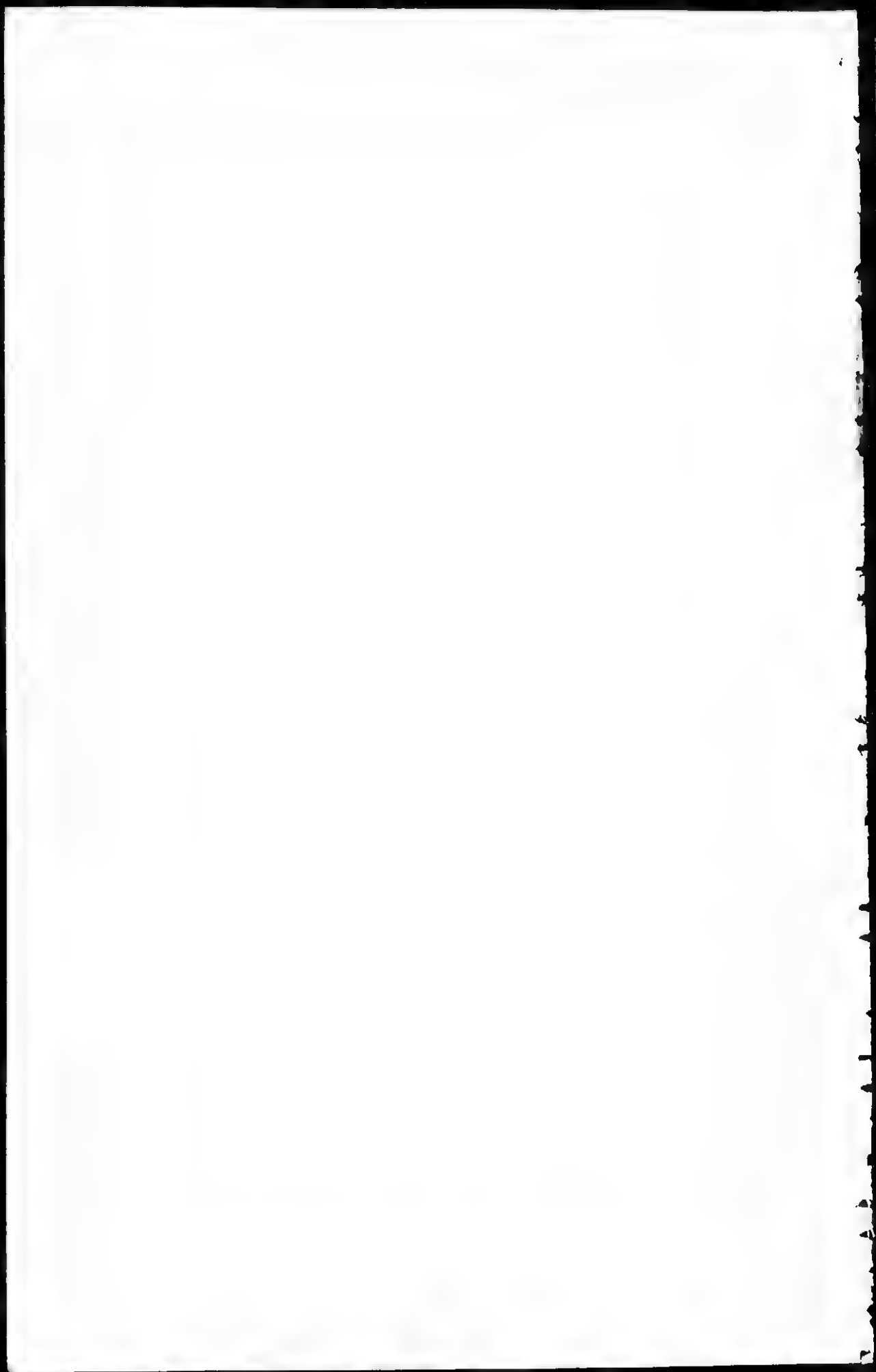
JOSEPH A. LOWTHER,

ANTHONY A. LAPHAM,

Assistant United States Attorneys.

FILED 1964

Taulson



QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

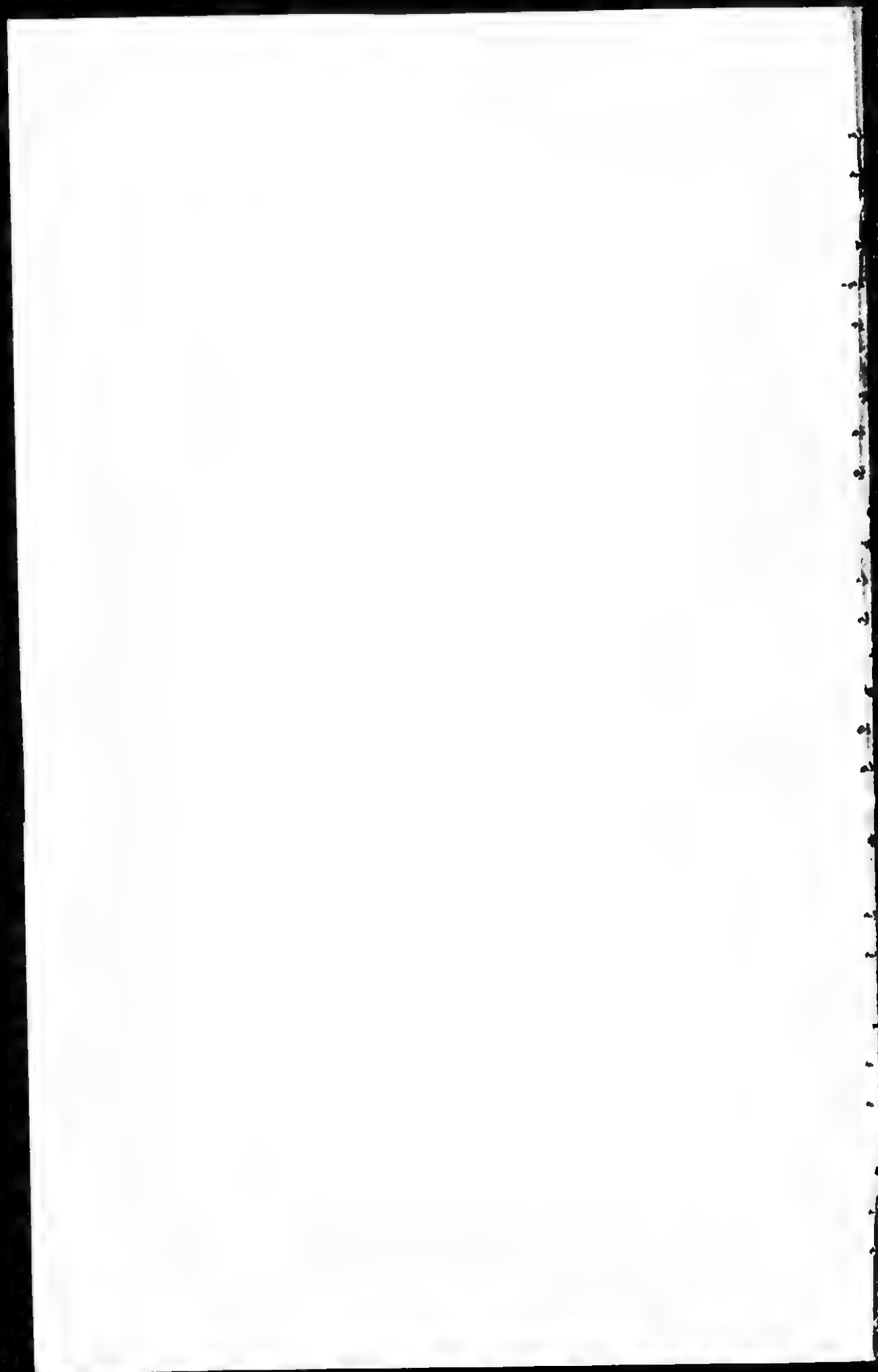
(1) Whether the trial judge erred in failing to disqualify himself on the basis of an affidavit which (a) was filed two days after the case had been sent to him for trial by an affiant who had been before him on both days seeking affirmative relief; (b) showed on its face that the facts on which it was based had been known to affiant for years; and (c) was directly traceable to adverse rulings on affiant's motions?

(2) Whether the court erred, over objections based on the Federal Communications Act, in admitting into evidence the contents of four telephone conversations between a witness and the accused where (a) these conversations were overheard on an extension phone and recorded by means of an induction coil apparatus; and (b) there was substantial evidence to support the finding that the telephone calls were made, overheard, and recorded with the consent of the witness?

(3) Whether an estoppel by judgment as to the question of consent by the witness in the matter of the tape recordings arose from (a) an order declaring a mistrial in another case, or (b) an order granting a motion to dismiss the indictment in another case?

(4) Whether the trial court erred in failing to exclude the live testimony of one co-conspirator against the others, and whether proper limiting instructions were given concerning post-conspiracy declarations by a co-conspirator?

(5) Whether the court erred in denying motions to dismiss the indictment based on alleged grand jury bias and alleged abuse of grand jury process?



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,711

JAMES J. LAUGHLIN, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 18,712

ALLAN U. FORTE, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A four-count indictment filed on July 2, 1963, charged appellants as follows: (1) Count One charged that appellants, in violation of 18 U.S.C. §371, unlawfully and knowingly conspired with each other and with one Bernice Gross, a co-conspirator but not named as a defendant, to defraud the United States and to commit other offenses against the United States, to wit, violations of 18 U.S.C. §1503 (Influ-

encing Witness), 18 U.S.C. §1621 (Perjury), and 18 U.S.C. §1622 (Subornation of Perjury); that said conspiracy related to proceedings preliminary to trial in Criminal Case No. 741-61, wherein Allan U. Forte was charged with violations of the abortion statute; that said conspiracy commenced on or about September 1, 1961, and continued until about February 20, 1963, the date of the return of the verdict in Criminal Case No. 741-61; that it was part of said conspiracy that appellants, well knowing that one Jean Smith would be a material witness, did corruptly endeavor to influence Jean Smith by persuading her to induce the Government to abandon prosecution, or if prosecution were not abandoned then to absent herself from the proceedings, or if she did not absent herself then to testify falsely; that it was part of the conspiracy to obstruct the administration of justice in the trial of Criminal Case 741-61 in the manner aforesaid; that the co-conspirators committed, among others, seventy-one enumerated overt acts in furtherance of the conspiracy. (2) Count Two charged Forte with the substantive offense (18 U.S.C. §1503) of corruptly endeavoring to influence the witness Jean Smith. (3) Count Three, subsequently dismissed on motion of the United States, charged appellant Forte with the same substantive offense as to one Dorothy Birge. (4) Count Four charged appellant Laughlin with the same substantive offense as to Jean Smith.

Motions to dismiss the indictment were denied on November 13, 1963, *United States v. Laughlin*, 223 F. Supp. 623 (D.D.C. 1963), and again on April 15, 1964. The trial judge having declined to disqualify himself on the basis of an affidavit of bias and prejudice filed by appellant Laughlin on April 16, 1964,¹ trial before a jury commenced on that day. On April 29 the jury returned a verdict against appellants on the conspiracy count and against each appellant on the substantive count involving Jean Smith. By judgment and commitment filed June 19, 1964, each appellant

¹ The relevant facts concerning the affidavit of bias and prejudice filed by appellant Laughlin and the judge's ruling thereon are set forth in Argument I, *Infra*.

was fined \$10,000 and sentenced to a term of imprisonment of from twenty (20) months to five (5) years on the conspiracy count; each appellant was also sentenced to a term of imprisonment of from twenty (20) months to five (5) years on the substantive count, those sentences to run concurrently with the sentences imposed on the conspiracy count. These appeals, consolidated by order of this Court dated July 24, 1964, followed.

Background

In Criminal No. 741-61, *United States v. Allan U. Forte*, Forte was charged in two counts with having procured and having attempted to procure an abortion on Jean Smith and in two counts with having procured and having attempted to procure an abortion on Dorothy Birge. The indictment was filed on September 11, 1961. On November 17, 1961, on motion of the defendant, the two counts relating to the alleged abortion on Smith were severed from the two counts relating to the alleged abortion on Birge. Laughlin entered his appearance as attorney for Forte on April 20, 1962.² On February 12, 1963, trial commenced on the two counts relating to the alleged abortion on Jean Smith. Smith testified as a witness for the prosecution. The trial ended in acquittal on February 20, 1963.

Following termination of the trial in Criminal No. 741-61, an investigation was conducted by the January 1963 Grand Jury into all evidence of any obstruction of justice in the case.³ That investigation resulted in several indictments.

² The District Court file, as well as the transcript of proceedings, in Criminal No. 741-61 are part of the record on appeal. Laughlin's praecipe, dated April 20, 1962, may be found in the file.

³ The origins of the investigation are traceable to the trial in 741-61. While testifying in his own behalf, Forte had charged that the arresting officer in the case, Detective Samuel Wallace, had offered to fix the matter and to protect his (Forte's) operations in the abortion trade for \$250 a month or a flat fee of \$2000 (Transcript of proceedings in 741-61, pages 326-327, 381-383). The charge was denied by Wallace. On the day before the trial ended, Laughlin filed a Motion For Lie Detector Test, asking the court to require both Forte and Wallace to submit to such a test and further

One of those indictments charged that Laughlin had committed perjury when, in testimony before the Grand Jury on March 6, 1963, he denied that he had ever met or spoken on the telephone with one Bernice Gross. Trial upon that indictment (Criminal No. 599-63) came on before Judge Youngdahl on October 1, 1963, and ended in a mistrial on October 8, 1963.⁴ The reasons for the declaration of a mistrial were set forth by Judge Youngdahl in a memorandum opinion. *United States v. Laughlin*, 222 F. Supp. 264 (D.D.C. 1963). Subsequently the indictment in Criminal No. 599-63 was dismissed by Judge Curran. *United States v. Laughlin*, 223 F. Supp. 623 (D.D.C. 1963). At the same time that Judge Curran granted Laughlin's motion to dismiss in Criminal No. 599-63, he denied appellant Laughlin's motion to dismiss the indictment in Criminal No. 600-63. The latter indictment, another of those returned by the January 1963 Grand Jury, charged both appellants with the offenses of which they were later adjudged guilty in the proceedings now before this Court for review.

EVIDENCE OF APPELLANTS' GUILT

So that the roles of the witnesses and the details of their testimony might be more clearly understood by the Court, the broad outlines of the evidence will first be drawn. Forte, charged in Criminal No. 741-61 with having attempted and procured an abortion on Jean Smith, desired that the case be dismissed or that the proof against him fail. To this end he caused certain sums of money to be delivered to Jean Smith. The money was intended as a reward to Smith

asking the court to admit the results in evidence. Government counsel opposed the motion on the grounds that the giving and grading of such tests would unduly delay the trial and that any evidence of obstruction of justice, a matter collateral to the issues at the trial, should be presented to a grand jury. He mentioned that "a Grand Jury should be immediately convened upon the conclusion of the trial and all evidence of any obstruction of justice should be presented." (Page 11, Transcript of hearing on Motion For Lie Detector Test, filed in Criminal No. 741-61).

⁴ The District Court file, as well as the transcript of proceedings, in Criminal Case No. 599-63 are also part of the record on appeal.

for either not appearing at trial or for testifying falsely in the event she did appear. Bernice Gross was the intermediary who transmitted the money from Forte to Smith. Dorothy Birge was also asked to contact Smith on behalf of Forte. Laughlin, Forte's lawyer, conspired to carry out his client's illegal purposes and he himself, through the agency of Bernice Gross, sought to corruptly influence the witness Smith.

Testimony of Jean Smith

Mrs. Smith received a phone call from Bernice Gross in "maybe February" of 1962 (Tr. 36, 39).⁵ They spoke about Criminal No. 741-61. Smith said she wished she didn't have to take part in the case, and Gross replied "it would probably never come to trial anyway." "[S]he (Gross) said one of those things that I could do was not be able to identify him (Forte) . . . that was said more than once." (Tr. 40-41).

Smith next heard from Gross in September or early October, 1962. Again the conversation concerned 741-61, Gross suggesting that she write a letter requesting to be dismissed from the case (Tr. 42, 44-45). Smith wrote such a letter (Government's Exhibit 1) (Tr. 43.) Shortly thereafter Gross called to say "she had a little present for me . . . for sending the letter in." (Tr. 45-46). The present consisted of \$75 in cash (Tr. 48).

In November, 1962, Gross came to Smith's house, the latter being then pregnant. Gross gave her a \$100 bill, explaining "I told them the reason you hadn't gone to a doctor was maybe you couldn't afford to." (Tr. 52-53). At the suggestion of Gross, Smith went to a Dr. Klein who in turn recommended an obstetrician named Goldberg

⁵ A great variety of transcripts will be referred to in this brief. Only two symbols will be used, however, to denote transcript references. The symbol 'Tr.' will denote a reference to the transcript of trial proceedings before Judge Hart. The symbol 'Mot. Tr.' will denote a reference to the 372 page transcript of pre-trial proceedings before Judge Hart on April 14-16, 1964. All other transcripts referred to will be fully identified. At no time will reference be made to any transcript which is not a part of the record on appeal.

(Tr. 49-50). A letter was then written by Goldberg to the United States Attorney (Government's Exhibit 2), and Gross soon called to say that the letter had been received, "that they were very pleased, and that the case definitely would be extended now, at least until January." (Tr. 51). A meeting was arranged by Gross, who "said they were so glad to have the case postponed again until at least January, she had another little gift for me." (Tr. 54). This time the gift was \$200 in cash (Tr. 55). Another gift from Gross, a baby's layette, was soon forthcoming because, Gross said, "the lawyer was so glad to have an extension of time" (Tr. 60-61).

"Several times" prior to January 20, 1963, Gross called concerning a letter which, according to Gross, "the lawyer" suggested that Smith write (Tr. 57, A-9). The letter, addressed to Mr. Acheson, was to request that Mrs. Smith be excused as a witness in 741-61 and was to be signed both by Mrs. Smith and her husband (Tr. 58-59, 97). Mrs. Smith wrote such a letter (Government's Exhibit 3), many of the ideas and phrases therein having been supplied by Gross, who "said she'd been talking to the lawyer on the phone" (Tr. 58). The "little gift" for sending this letter was \$150 in cash (Tr. 62).

"Just about every time we talked," Gross suggested that Smith "could forget to identify and so on" (Tr. 63). She also suggested that it would be possible to "answer a lot of questions with 'I don't remember' or 'I don't know'" (Tr. 102).

Mrs. Smith acknowledged that the letters written by her to the United States Attorney reflected her actual feelings in the matter of 741-61 and that she wasn't coerced into writing them (Tr. 112). She said she felt under no obligation as a result of the gifts of money and had in fact appeared as a witness and testified fully in the trial of 741-61 (Tr. 69, 112).

Testimony of Dorothy Birge

In early September, 1961, this witness received a telephone call from Forte, who identified himself by name and whose voice she recognized. Forte asked the witness to contact Jean Smith and tell her (Smith) "that she could have her money back." (Tr. 133). Forte said he wanted Smith "to have a complete lapse of memory on the stand." (Tr. 134).⁶

Testimony of Bernice Gross

After this witness, an unindicted co-conspirator, was discharged from the Baltimore police force early in 1962, she went to work for the Hecht Company at their Northwood store in Baltimore (hereinafter called the Northwood store).

"Around May" of 1962 she received a telephone call from Forte, who identified himself by name (Tr. 152). Forte asked "if I had any contact with Jean Smith . . . [H]e asked me if I could help him as far as getting her to maybe not recognize him when the case would come to trial." (Tr. 157, 528). He added "that I would be taken care of, and so would Jean." (Tr. 158). In that conversation the witness agreed to "approach" Jean Smith. She did so but was rebuffed. Smith told her that she was "not the type that can lie" (Tr. 158). At the same time Smith indicated that she didn't want to proceed with the prosecution (T. 526). The result of the contact was reported by Gross to Forte (Tr. 159).

In September, 1962, the witness received another call from Forte. At that time Forte "told me that he had

⁶ The count in the indictment which charged Forte with corruptly endeavoring to influence Dorothy Birge was dismissed on December 9, 1963, on motion of the United States. Appellants contend (Br. 8) that, this count having been dismissed, this witness should not have been permitted to testify or that the jury should have been instructed to disregard her testimony. The contention is utterly frivolous. Birge's testimony did not relate to the dismissed count. Rather it related directly to the count charging Forte with endeavoring to corruptly influence Jean Smith.

acquired a new attorney." The substance of the call was that "his attorney would get in touch with me and tell me what to do, or what to tell Jean Smith to do." (Tr. 161). The name of this attorney was "Mr. Laughlin" (Tr. 162).

In October, 1962, the witness received a telephone call at the Northwood store. The speaker identified himself as Mr. Laughlin (Tr. 163). "He wanted to meet me in person, and he asked me about Jean Smith, how long had I known her, was she the type of person that would be blackmailing Dr. Forte for months and months to come, or just what type of person she was, and I told him I didn't think she was that type of person." (Tr. 164).

That evening Laughlin came to the Northwood store. He spoke with the witness for "fifteen or twenty minutes" in the third floor lounge (Tr. 165-167). "I think he asked me (at that time) to get her (Smith) to write this letter (Government's Exhibit 1). I don't remember." (Tr. 166). Laughlin handed the witness his business card and said: "I'll keep in touch with you." (Tr. 240, 710).

Prior to October 15, 1962, and pursuant to Laughlin's directive that she "tell Jean Smith to write a letter that she did not want to appear as a witness," the witness contacted Smith by phone (Tr. 168, 532-534). "I told her to write this letter and she did, and she would be taken care of." (Tr. 168). Shortly after "speaking to Smith, the witness heard from either Forte or Laughlin that the letter (Government's Exhibit 1) had been received at the United States Attorney's office (Tr. 169).

Soon after this letter was written, the witness was called by Jean Smith. Smith said she needed and was willing to accept money. This message was relayed by Gross to either Forte or Laughlin (Tr. 170-171).

"Maybe a week later," still in October, 1962, Forte called the witness and arranged to meet her at the Chesapeake Club in Baltimore (Tr. 172). A meeting took place at which Forte gave the witness \$100. The money, he said, was for Jean Smith. The witness delivered \$75 to Smith and kept \$25 for herself. (Tr. 172-174).

In November, 1962, the witness again met Forte at the

Chesapeake Club. There she received a \$100 bill which she subsequently delivered to Smith. Her recollection was that this money "was for this letter she (Smith) had written." (Tr. 181-184).

At still another meeting with Forte at the Chesapeake Club later in November, 1962, the witness received \$200 to pass on to Smith. "It (the money) was supposed to go to a doctor, for Jean. She hadn't gotten an obstetrician yet and I believe she was in her seventh month. She said she couldn't afford one." The money was turned over to Smith in the Northwood store. Forte had recommended Dr. Klein and Dr. Goldberg and their names were suggested by the witness to Smith (Tr. 184-188).

With respect to the letter from Dr. Goldberg dated November 13, 1962, (Government's Exhibit 2), Laughlin had told the witness "that it would be better if she had gotten a letter from a doctor saying that she (Smith) was pregnant and couldn't attend the trial." (Tr. 231). On or about November 15, 1962, the witness was told by either Forte or Laughlin that the letter from Dr. Goldberg had been received in the United States Attorney's office, and as a result "they hoped that it (the case) would be dismissed." (Tr. 188-189).

For Christmas, 1962, the witness was given a present of \$100 by Forte (Tr. 189-190, 538-539).

On January 18 or 19, 1963, the witness spoke to Laughlin on the telephone about the letter which he had requested that Jean Smith and her husband write (Government's Exhibit 3). He said that the joint letter "would be a better reason for dismissing the case." He also provided some of the words to be used in the letter (Tr. 220-225).

Shortly after January 20, 1963, the witness heard from Laughlin that the letter had been received in the United States Attorney's office. He told her "that he thought it would be dismissed, the case would be dismissed after that." (Tr. 224-226). She told Laughlin that "she (Smith) should get the money for writing the letter." Laughlin replied "that he would get in touch with Dr. Forte." (Tr. 226-227). The witness then received a communication

from Forte, as a result of which she met him at the Chesapeake Club and received \$200 which she later turned over to Smith at the Northwood store (Tr. 228-229).

Including the \$100 Christmas present which was given to her, the witness received "in the vicinity of \$650" from Forte (Tr. 539). She met Forte at the Chesapeake Club between four and six times (Tr. 541). She met Laughlin only once and never received any money from him (Tr. 543, 703). She spoke to Laughlin frequently on the phone, however, and by referring to telephone records and bills was able to recall the dates of those calls (Tr. 243-260). They all involved Criminal No. 741-61 (Tr. 259). Many of the conversations concerned "Jean Smith and what she would do, whether she would—is she the type that would blackmail the doctor after the trial." (Tr. 299).

Telephone Records

The credibility of Bernice Gross was impeached by her own admissions that she had perjured herself, in connection with the very matters to which she was testifying at trial, during two appearances before a grand jury on March 1, 1963⁷ (Tr. 572-580, 686). On the other hand her testimony was corroborated by telephone records, kept in the regular course of business, which tended to indicate that she had in fact spoken with Forte and Laughlin at the times indicated by her.

At all times material to the charges contained in the indictment, telephone numbers of the parties concerned were as follows: Laughlin's office phones: NAtional 8-1690, NAtional 8-2001 (Washington); Laughlin's home phone: EMerson 2-1776 (Washington); Forte's office phone: TAYlor 9-3377 (Washington); Gross' business phone: IDlewood 3-8000 (Baltimore); Gross' home phone: FOrEst 7-7440

⁷In the first grand jury appearance on March 1, 1963, Gross denied having been contacted by Forte or anyone acting in Forte's behalf in connection with the Smith abortion case. In her second appearance on March 1, she denied ever having met Laughlin face to face.

(Baltimore). The records in evidence consisted of (1) punch cards containing information on long-distance calls charged to these numbers, including date of call, time of connection, length of call, and name of one or both parties in collect or person-to-person calls; (2) monthly billings on these numbers showing, as to each call, amount of charges, date, type of call, and number called. The records tended to establish the following (Tr. 820-941):

December 1, 1962:	collect person-to-person call from Gross to Forte
December 3, 1962:	collect person-to-person call from Gross to Forte
December 18, 1962:	collect person-to-person call from Miss Bee to Forte ⁸
January 7, 1963:	collect station-to-station call from Gross to Forte's office number
October 11, 1962:	direct dial call from Laughlin's office number to Gross' business phone
October 16, 1962:	person-to-person call from Laughlin's office number to Bernice Gross
October 18, 1962:	direct dial call from Laughlin's office number to Gross' business phone
October 22, 1962:	same
October 22, 1962:	same
October 26, 1962:	same
October 29, 1962:	collect person-to-person call from Gross to Laughlin
November 8, 1962:	same
November 9, 1962:	person-to-person call to Gross from Laughlin's office number
November 13, 1962:	direct dial call from Laughlin's office number to Gross' business phone

⁸ Gross testified that in February, 1963, Forte told her to use the name Miss B if she ever called him (Tr. 229).

November 27, 1962: collect person-to-person call from Gross to Laughlin

January 18, 1963: person-to-person call from Laughlin's office number to Gross

February 7, 1963: same

February 12, 1963: direct dial call from Laughlin's office number to Gross' home number

February 12, 1963: direct dial call from Laughlin's home number to Gross' home number

February 13, 1963: direct dial call from Laughlin's office number to Gross' home number

February 19, 1963: person-to-person call from Gross' home number to Laughlin

February 27, 1963: same

February 28, 1963: direct dial call from Laughlin's office number to Gross' home number

EVIDENCE AS TO APPELLANT LAUGHLIN ONLY

There were admitted into evidence, against appellant Laughlin only, tape recordings of four telephone conversations between himself and Bernice Gross (Tr. 362). At trial the recordings were played once to the jury in the presence of Bernice Gross (Tr. 320-341⁹), who identified the voices, and again during closing argument by the prosecutor (Tr. 1041-1048, 1052-1058). At the pre-trial hearing on appellant Laughlin's motion to suppress these tapes, and at the trial itself, there were developed facts relevant to the issue of whether the telephone calls were made and recorded with the consent of Bernice Gross.

⁹ There are two transcripts of the tape recordings in the record on appeal. One appears as part of the volume containing the pre-trial hearing on the motion to suppress (Mot. Tr. 98-116). The other is a separate volume marked pages B-2 through B-23. A court reporter's note at Tr. 320 explains that pages B-2 through B-23 should be renumbered and inserted as pages 320-341.

In finding consent on the part of Gross, the trial judge in the instant case reached a result contrary to that which had been reached when the same issue was twice considered in connection with Criminal No. 599-63. *United States v. Laughlin*, 222 F.Supp. 264 (1963) (declaration of mistrial by Judge Youngdahl); *United States v. Laughlin*, 223 F.Supp. 623 (1963) (dismissal of indictment by Judge Curran). The facts relevant to the issue of consent are summarized in Argument II, *infra*. The nature of the prior judicial proceedings, the rulings made therein and the effect of those rulings on the instant case, Criminal No. 600-63, are examined in Argument III, *infra*.

At the pre-trial hearing, Assistant United States Attorney Harold Sullivan, at whose request the telephone calls were placed, explained how and when the recordings were made (Mot. Tr. 118-137): two of them were made following the second appearance of Bernice Gross before the grand jury on March 1, 1963; a third was made on March 13, 1963; the fourth was made on March 18, 1963,¹⁰ another day on which Gross appeared and testified before the grand jury. All the calls were placed by Mrs. Gross from the office of Mr. Acheson, the United States Attorney; Mrs. Gross placed each call from the telephone at the south end of the office; in each case one end of an induction coil was positioned beneath the base of a regularly used extension telephone at the north end of the office; the other end of the induction coil was plugged into a recording machine; the coil was not physically attached to the telephone; by a principle of magnetism, however, when the receiver was lifted from the cradle the sound impulses coming into the extension telephone were transmitted through the coil to the recording machine.

Mrs. Gross of course knew the conversations were being recorded. Appellant Laughlin did not. Sullivan testified that he suggested a line of conversation to be followed by

¹⁰ A fifth Gross-Laughlin call was also made on March 18, 1963. The apparatus was not properly adjusted, however, and the recording was inaudible (Mot. Tr. 114-115).

Gross in connection with each call (Mot. Tr. 131-134, 182, 184). The purpose of the calls generally was to ascertain whether Gross was telling the truth when she stated she had had contacts with Laughlin in connection with the Smith abortion case, and to determine whether Laughlin was culpable in this matter (Mot. Tr. 154, 184, 194).

In the first conversation of March 1, 1963 (Tr. 322-326), Gross reported that she had been before the grand jury "I think they are on to us," she said, in response to which Laughlin asked: "Well, you didn't admit anything did you?" Describing the day's inquiry, Gross said "they wanted to know how much money he has given me." Laughlin replied: "Yes, well, he didn't give you anything."

In the second conversation of March 1, 1963 (Tr. 328-330), Gross spoke again about her predicament and this exchange occurred (Tr. 330):

"LAUGHLIN: After all, of course you did pick a beauty in that Miss Smith. You said she was 100 carat—she was solid gold.

"GROSS: Well, who knows.

"LAUGHLIN: Well, however, of course, I saw the woman. I mean the woman is—well, she's just a tramp. Anybody that—you know—that would take help and then bite the hand that feeds them and so on, well, she's just absolutely worthless. But you know, if you need somebody let me know. It may be—and as far as you're concerned, maybe—you told—you didn't know me, didn't you?

"GROSS: No, I told them I didn't know—I had never had any contact with you.

"LAUGHLIN: That's right, that's right. So, anyway, if you find you're coming back, give me a ring sometime Monday, see, and I'll see that you have somebody, see. You do that now."

The topic of conversation on March 13, 1963 (Tr. 332-337), was Jean Smith. With reference to Smith, Laughlin

remarked: "Well, you sure picked out a lemon in her, didn't you?"

In the conversation of March 18, 1963 (Tr. 338), Gross reported that she had received another subpoena and Laughlin told her to "do whatever you think is best now."

Since all four conversations took place after the termination of the conspiracy alleged in the indictment, they went to the jury under limiting instructions concerning post-conspiracy statements (Tr. 261, 302, 1153-1154). Twenty-seven instructions tendered by appellants were denied. One request for instructions was granted as submitted, two were granted in substance, and one was granted as amended.

STATUTES INVOLVED

Title 18, United States Code, Section 371, provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 1503, provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other com-

mitting magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Title 28, United States Code, Section 144, provides:

When a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Title 47, United States Code, Section 605, provides in pertinent part:

. . . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

SUMMARY OF ARGUMENT

I

The trial judge properly refused to disqualify himself on the basis of an affidavit of bias and prejudice filed two days after the case had been assigned to him for trial by an affiant who had been before him on both those days seeking favorable action on motions to suppress evidence and dismiss the indictment. Under a statute which makes timeliness of the essence, a litigant cannot sample the temper of the court before presenting a claim of disqualification. Moreover, on this record the filing of the affidavit may be traced directly to rulings of the trial court adverse to affiant.

II

The contents of four telephone conversations between a witness and the accused, overheard and recorded with the consent of the witness, were admissible against the accused at trial. Listening in to a telephone communication with the consent of one of the parties is not a prohibited 'interception' within the meaning of the Federal Communications Act. Nor does recording the conversation by means of an induction coil make it so.

Here the finding of consent to listen on the part of the witness was supported by substantial evidence and should not be overturned. In the absence of government misconduct, consent was not vitiated by the fact that the witness reasonably thought it in her own best interests to cooperate in making the calls.

III

The government was not precluded by the doctrine of collateral estoppel from litigating the consent question. That doctrine makes conclusive upon the parties in a subsequent proceeding only matters distinctly placed in issue, actually litigated, and finally determined in a prior suit. Here appellant sought to support his claim of estoppel on a prior order declaring a mistrial and a prior order dismissing an indictment. The mistrial order was interlocu-

tory only and thus had no collateral consequences. The dismissal order, while a final judgment, was not conclusive on the question of consent because that question was not placed in issue or litigated therein and was not determined thereby.

IV

The rule that post-conspiracy statements are admissible against the declarant only does not bar the live courtroom testimony of one co-conspirator against the others.

With reference to the tape recordings, the court properly instructed the jury that they were admissible only against Laughlin, only in the event a conspiracy was found to exist, and only for the limited purpose of connecting him with that conspiracy.

V

The motion to dismiss the indictment on the ground of grand jury bias was properly denied. The only evidence in support of this motion was insubstantial and controverted.

The motion to dismiss the indictment on the ground that a grand jury had been improperly utilized to prepare the pending indictment for trial was properly denied. Even had there been any showing in support of this motion, which there was not, appellants would not have been entitled to dismissal of the indictment.

ARGUMENT

I. The affidavit of bias and prejudice was filed out of time and the trial judge properly refused to disqualify himself.

(See Mot. Tr. 3, 314-315, 319-320; Tr. 198)

On the morning of April 14, 1964, the assignment court referred this case to Judge Hart "for trial"¹¹ (Mot. Tr. 3). Pending at that time were appellants' motions to sup-

¹¹ In their brief, appellants profess not to understand how the case came to be assigned for trial to Judge Hart (Br. 66). They point to an order of the District Court, dated March 10, 1964, assigning

press evidence and to dismiss the indictment. Disposition of these motions required two full court days of testimony and argument. Late in the afternoon of April 15, 1964, the hearing concluded with rulings favorable to the prosecution on both motions (Mot. Tr. 314-315). Just prior to adjournment of the proceedings on this day, appellant Laughlin stated to Judge Hart: "I don't believe Your Honor could fairly try the case in view of these rulings." (Mot. Tr. 315). He also alluded to "comments you (Judge Hart) have made during the day."

When the proceedings resumed on the morning of April 16, 1964, appellant Laughlin, purporting to act under 28 U.S.C. § 144, presented for filing an affidavit of bias and

Judge Hart to Motions Court No. 2 "effective from and including April 7, 1964, until further order of the Court." (A copy of this order was attached to the Supplement to Affidavit of Bias and Prejudice filed by appellants on April 20, 1964; that order was referred to in their motion for a new trial (p. 7); another copy was attached to their motion in this Court for summary reversal). Clearly implied by appellants is the charge that Judge Hart reached out for this case in spite of or in disregard of his assignment to Motions Court.

On May 6, appellee opposed appellants' motion for a new trial. Attached to its opposition was a copy of the District Court Memorandum, dated April 6, 1964, stating that "by agreement of the Judges involved they will rotate their regular assignment for the months of April, May, and June" and going on to show that Judge Hart accepted reassignment to Criminal Court No. 5 for the month of April, 1964. This Memorandum is in the record on appeal and is reproduced as Appendix A of this brief. There may also be found in the record on appeal the courtroom log of Judge Hart for the month of April, 1964. Examination of the log (which was made a court exhibit in the motion for a new trial and is reproduced as Appendix B of this brief) reveals that Judge Hart, pursuant to the Memorandum referred to above, commenced sitting in Criminal Court on April 7, 1964, and that during the month of April he disposed of numerous criminal matters and presided at several criminal trials in addition to Criminal No. 600-63, *United States v. Forte and Laughlin*.

The District Court Memorandum of April 6, 1964, and the courtroom log of Judge Hart conclusively refute appellants' suggestion that the case was assigned to Judge Hart otherwise than in the regular and ordinary course of the District Court's business.

prejudice accompanied by both his and his attorney's certificate of good faith. In the affidavit Laughlin set forth the following: (1) that Judge Hart had approached him in June, 1959, with a request that he (Laughlin) testify in his (Hart's) behalf before the Judiciary Committee of the United States Senate. (Presumably, although it is not specified in the affidavit, this Committee was considering whether to confirm Judge Hart's appointment to the District Court); (2) that Judge Hart had then stated that affiant Laughlin's testimony would be useful because of his (Hart's) inexperience in criminal matters and because he (Hart) had drawn criticism for his opposition to the Mallory Rule; (3) that affiant Laughlin had agreed to testify "but further stated to the said judge that it was a matter of comment that the said judge had been closely allied with the police;" (4) that affiant Laughlin, on June 16, 1959, had in fact testified at a Senate Judiciary Committee hearing involving Judge Hart; (5) that affiant Laughlin had informed the Committee "that he could only give Judge Hart only a qualified endorsement on account of his close affinity to the police and that he (Hart) should alter his stand as to police practice." The affidavit closed with a prediction that "Judge Hart, due to his close affinity to the police as already referred to, will endeavor in every way possible to protect Wallace and to rule out any attempt on the part of the affiant to bring to the attention of the jury the role played by Wallace and others allied with him in this case."

Judge Hart declined to disqualify himself on the ground that the affidavit of bias and prejudice was not timely filed.¹² His action in this regard was altogether proper.

¹² Appellants contend in their brief, as Laughlin did in the Supplement to Affidavit of Bias and Prejudice filed on April 20, 1964 (Tr. 198), that Judge Hart violated the mandate of 28 U.S.C. § 144 by disputing the truth of certain matters set forth in the original affidavit of prejudice. It is quite true that Judge Hart denied some of the allegations contained in Laughlin's affidavit. It clearly appears, however, that Judge Hart recognized that the statute required him to accept these allegations as true, and that he based his rejec-

The applicable statutory provision, 28 U.S.C. § 144, requires that the (District Court) judge "before whom the matter is pending" shall "proceed no further therein" if one of the parties "files a timely and sufficient affidavit" alleging prejudice. The affidavit must state the facts and the reasons for the belief that bias or prejudice exists, and must, according to the statute, be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."

Since the privilege which the statute extends to the party

tion of the affidavit not on the ground that it was legally insufficient but rather on the ground that it was not timely. His ruling was cast as follows (Mot. Tr. 319-320):

"Mr. Laughlin, I have read your affidavit, and although I cannot, under the rules and under the statute, concern myself with the truth or falsity of it, I cannot help but remark that there are matters in there alleged against me personally, such as that I approached you in the National Press Building in 1959 asking if you would testify on my behalf, which are not true. However, your motion comes too late. This case was sent to me on the 14th for trial. You announced no bias at that time in these matters which you say go back to 1959. Had you announced bias at that time I would have immediately disqualified myself, but you wait until after the preliminaries of the trial start and are concluded and then after the court rules against you on a motion you then, for the first time, suggest bias. At that time the suggestion of bias comes too late and does not come within the time limits set by Title 28, Section 144. Now, it is true that Title 28, Section 144, provides that the affidavit shall be filed ten days in advance. That does not apply in this jurisdiction because, of course, under our master calendar system counsel does not know ten days in advance what judge will receive the case, but it does apply to this extent, that it must be a reasonable length of time, which is at the beginning of the proceedings, and had you announced at the beginning of these proceedings that you felt that I was prejudiced, I would have recessed the matter to permit you to file an affidavit, and I would have then disqualified myself, but having waited until the motions were heard and the Court ruled against you, the court case having been sent here two days ago for trial, and having announced that we would start the trial this morning, I rule that your affidavit comes too late and I will deny it."

litigant may be easily abused, "strict compliance with its provisions is required." *Skirvin v. Mesta*, 141 F. 2d 668, 672 (10th Cir. 1944); cf. *Bishop v. United States*, 16 F. 2d 410, 411 (8th Cir. 1926). "The requirement of timeliness is of fundamental importance." *In Re United Shoe Machinery Corporation*, 276 F. 2d 77, 79 (1st Cir. 1960). "Time is a matter of substance and not merely one of form." *United States v. 16,000 Acres of Land*, 49 F.Supp. 645, 656 (D. Kan. 1942). The statute makes time of the essence "for the obvious purpose of preventing their (the affidavits) use as a device to obtain last minute postponements of trial and to prevent a litigant from sampling the temper of the court before deciding whether or not to file an affidavit of prejudice . . ." *Peckham v. Ronrico Corporation*, 288 F. 2d 841, 843 (1st Cir. 1961).

Appellee realizes, as did Judge Hart (Mot. Tr. 320), that the provision of the statute requiring that the affidavit be filed "not less than ten days before the beginning of the term of court" is not here applicable because the case was not assigned to Judge Hart until two days before trial. Cf. *Willenbring v. United States*, 306 F. 2d 944, 945 n. 2 (9th Cir. 1962); *Eisler v. United States*, 83 U.S. App. D.C. 315, 170 F. 2d 273 (1948), cert. dismissed, 338 U.S. 883 (1949). It by no means follows, however, that Laughlin was free to wait until the morning of trial before filing his affidavit. For wherever the ten-day provision is for some reason not applicable, the statute nevertheless requires that a party act promptly and diligently in presenting a claim of disqualification. *Faubus v. United States*, 254 F. 2d 797 (8th Cir. 1958) (where hearing on petition for preliminary injunction scheduled for September 20, affidavit held untimely when filed on September 19 by a litigant made a party to the suit on September 10); *Bommarito v. United States*, 61 F. 2d 355 (8th Cir. 1932) (where affiant represented that knowledge of bias and prejudice did not come to him within ten-day period, affidavit nevertheless held untimely when it appeared that affiant was in possession of facts four days before trial but waited until day of trial to file); *Bishop v. United States*, *supra* (where ten-day pro-

vision did not apply because case was set for trial at same term during which indictment was returned, affidavit not presented until day of trial held untimely); *Chafin v. United States*, 5 F. 2d 592 (4th Cir. 1925) (where indictment found after beginning of court term, and ten-day provision therefore inapplicable, affidavit filed on day of trial ruled untimely). And see *Rossi v. United States*, 16 F. 2d 712, 716 (8th Cir. 1926).

If the indictment is returned after the term of court has begun, or the ten-day provision is for some other reason inapplicable, the affidavit, in order to meet the timeliness requirements of the statute, "must be filed as soon as the disqualifying facts are known." *Bishop v. United States*, *supra*, 16 F. 2d at 411; *Chafin v. United States*, *supra*, 5 F. 2d at 594. Measured by this standard, the affidavit filed by appellant Laughlin was clearly untimely, it showing on its face that the facts alleged therein were known to Laughlin long before trial. Certainly none of these facts came to light during the two days which elapsed between the assignment of this case to Judge Hart on April 14 and the actual beginning of trial on April 16. In fact, Laughlin spent most of both these days before Judge Hart seeking favorable action on his motions to dismiss the indictment and to suppress evidence, and never once during this period did he suggest bias or prejudice. This conduct alone would be enough to render untimely the affidavit filed on April 16. "An affidavit filed long after the time fixed by the statute, and after the party making the affidavit has participated in proceedings and has invoked or sought to invoke the affirmative action of the court in his behalf, without any cause shown for the delay, does not comply with the exaction of the statute in respect to time." *Skirvin v. Mesta*, *supra*, 141 F. 2d at 672 (emphasis supplied). To the same effect is *Tennessee Pub. Co. v. Carpenter*, 100 F. 2d 728, 734 (6th Cir. 1938), *cert. denied*, 306 U.S. 659 (1939).

Appellee submits that the real basis for the claim of prejudice against Judge Hart was exposed by an incident which occurred on April 15th at the conclusion of the hearing on appellants' motions. No sooner had the motions been de-

nied than appellant Laughlin remarked: "I don't believe Your Honor could fairly try the case in view of these rulings." (Mot. Tr. 315). That the affidavit of bias was filed the following morning cannot rationally be interpreted otherwise than as a response by Laughlin to the adverse rulings. It was just such an abuse of the statutory privilege conferred by Section 144 that its requirement of timeliness was designed to prevent. "One of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives." *In Re United Shoe Machinery Corporation*, *supra*, 276 F. 2d at 79.

Appellant Laughlin is no stranger to the requirement that an affidavit be timely filed. In *Laughlin v. United States*, 80 U.S. App. D.C. 101, 151 F. 2d 281 (1945), *cert. denied*, 326 U.S. 777, another of his affidavits was held to have been filed out of time. So fitting is the language of that decision to the present circumstances that it bears repeating:

"The paper [affidavit] shows on its face that the alleged bias on which disqualification was sought had been known to appellant for years. His action, therefore, in deliberately holding back the filing until after the first day's proceedings and after Judge Bailey had ruled on sundry matters, and after he had, at appellant's request, granted a continuance, was not only not a showing of good cause for the delay, but, as the Judge properly held, a waiver of appellant's statutory right to a consideration of the affidavit." 80 U.S. App. D.C. at 104, 151 F. 2d at 284.

II. The tape recordings of telephone conversations between Bernice Gross and appellant Laughlin were properly admitted in evidence.

(See Mot. Tr. 124-127, 276, 278, 282-283, 299-303; Tr. 261, 302, 362, 987, 1041-1048, 1052-1058, 1153-1154)

At the various times indicated and under the circumstances already described in appellee's Counterstatement herein, four telephone conversations between Bernice Gross and appellant Laughlin were recorded on tape in the office of the United States Attorney. In each instance a call was placed by Gross to the known office telephone number of Laughlin. In each instance connection was made with a voice which Gross recognized as being that of Laughlin. In each instance the ensuing conversation was recorded by means of an apparatus consisting of an induction coil, one end of which was set beneath the base of a regularly used extension telephone and the other end of which was plugged into a tape recording machine. All four recordings were received in evidence¹³ (Tr. 362). Appellant Laughlin contends that the manner in which the recordings were obtained violated the Federal Communications Act, 47 U.S.C. § 605, and abridged his rights under the Fourth and Fifth Amendments to the Constitution.¹⁴ Appellee disagrees on both counts.

¹³ The evidence was admitted against Laughlin only and was covered by proper instructions concerning post-conspiracy statements. See Argument IV, *infra*.

¹⁴ Appellants urge a number of other points of error in connection with the admission of the tapes. None of these require lengthy discussion.

(1) They claim that the court erred in permitting the tapes to be played during closing argument by the prosecutor (Tr. 1041-1048, 1052-1058). But the permissible extent of comment and argument by the prosecutor is a matter addressed to the sound discretion of the trial court. *United States v. Schwartz*, 325 F. 2d 355 (3d Cir. 1963). There can be no abuse of this discretion where argument is confined to the evidence and legitimate inferences drawn therefrom. *United States v. Spangelet*, 258 F. 2d 338 (2d Cir. 1958); *Brennan v. United States*, 240 F. 2d 253 (8th Cir.), *cert. denied*, 353 U.S. 931

Appellant's Constitutional Rights Were Not Infringed

The Supreme Court has long since rejected appellant's constitutional arguments. In *Olmstead v. United States*, 277 U.S. 438 (1928), it was held that wiretapping, at least where it involved no intrusion onto a defendant's premises, was violative of neither the Fourth or Fifth Amendments. The *Olmstead* ruling has been consistently reaffirmed in a line of decisions sustaining against constitutional challenge the use of various listening devices to overhear conversations beyond the reach of the human ear. *Goldman v. United States*, 316 U.S. 129 (1942); *On Lee v.*

(1957). No abuse of discretion has been found where sample implements of crime not even in evidence were displayed to the jury during closing argument, *Sanders v. United States*, 238 F. 2d 145 (10th Cir. 1956), where enlarged tax schedules showing the government's computations of appellant's income were used as an aid to argument in a tax evasion case, *Hanson v. United States*, 254 F. 2d 359 (6th Cir.), *cert. denied*, 358 U.S. 833 (1958), or where charts graphically illustrating the government's version of the evidence were employed in argument. *Holland v. United States*, 209 F. 2d 516 (10th Cir.), *affirmed*, 348 U.S. 121 (1954). Certainly no abuse occurred in this case where, far from drawing any unwarranted inferences from the evidence, the prosecutor let the evidence speak for itself.

(2) Appellant Forte argues that the admission of the tapes against his attorney Laughlin entitled him to a severance. He is speaking, of course, about a severance of defendants. At trial, however, it appeared that he was seeking a severance of counts. (See Tr. 987, where Laughlin, in his role as attorney for Forte, moved the court "that there be a severance in this case that—Dr. Forte is willing to testify as to Count 2, but not as to Count 1." And see Tr. 208, where in moving for a severance for the first time on behalf of Forte, Laughlin placed his reliance on *Cross v. United States*, D.C. Cir. 17596, decided March 26, 1964, a case dealing with severance of counts.)

However construed, Forte's motions were properly denied. If construed as motions for a severance of counts, then Forte fell far short of making the showing of prejudice required by Rule 14, Fed. R. Crim. P. Since the joined conspiracy and substantive offenses were essentially the same crime provable by the same evidence, there is no possibility that the jury "used the evidence of the one crime

United States, 343 U.S. 747 (1952); *Lopez v. United States*, 373 U.S. 427 (1963). In these cases the only restriction traceable to the Constitution is the insistence that the listening device not be planted by an unlawful invasion into a constitutionally protected area. *Silverman v. United States*, 365 U.S. 505 (1961).

In the instant case there was obviously no entry, either physically or by device,¹⁵ into any area where the govern-

to convict of the other or cumulated the evidence to find guilt under both charges." *Drew v. United States*, ___ U.S. App. D.C. ___, ___, 331 F. 2d 85, 89 (1964). And cf. *Cross v. United States*, *supra*.

If construed as motions for a severance of defendants, then Forte was still defeated by the Rule 14 requirement that actual prejudice be affirmatively shown. *Schaffer v. United States*, 362 U.S. 511, 515-516 (1960). The mere fact that evidence against one defendant is not admissible as against another is not a conclusive ground for severance. *Dykes v. United States*, 114 U.S. App. D.C. 189, 313 F. 2d 580 (1962), *cert. denied*, 374 U.S. 837 (1963); *Hall v. United States*, 83 U.S. App. D.C. 166, 168, F. 2d 161 (1948), *cert. denied*, 334 U.S. 853; *Lucas v. United States*, 70 U.S. App. D.C. 92, 104 F. 2d 225 (1939). Here the only evidence against Laughlin inadmissible as against Forte was the tape recordings. Forte was not named anywhere in those recordings. Any statements therein which could possibly be taken as referring to him were made by Gross and were therefore in the nature of prior consistent statements by a trial witness rather than hearsay declarations of a co-conspirator. Moreover, there was no practical method of deleting the references to Forte, assuming such references do exist. Cf. *Delli Paoli v. United States*, 352 U.S. 232, 237 (1957). Compare *Oliver v. United States*, ___ U.S. App. D.C. ___, 335 F. 2d 724 (1964), *Greenwell v. United States*, D.C. Cir. No. 18,193, decided August 13, 1964. Finally, if any doubt remains, the jury was thrice instructed that post-conspiracy statements, including the tapes, were admissible against the declarant only (Tr. 261, 302, 1153-1154).

(3) Appellant Laughlin claims that the recordings were made in violation of existing Department of Justice directives. He cites no such directives. Moreover, the policies to which he refers (Br. 29-31) are obviously administrative in character and have no application in the area of criminal investigation. Such policies are hardly a proper basis for excluding evidence in a federal court.

¹⁵ In *Goldman*, *On Lee*, and *Lopez* the listening devices were set up so as to overhear conversations occurring wholly within de-

ment had no right to be. The recording machine and induction coil were set up in one of the government's own offices and the extension telephone was permanently installed therein. Since the use of this equipment involved no trespass, it likewise deprived appellant of no constitutional right.

The Federal Communications Act Was Not Violated

The Federal Communications Act, 47 U.S.C. § 605, provides in pertinent part: "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The question whether an "interception" within the meaning of the Act occurs when a third party listens in to a telephone conversation by means of an extension phone or other device has been much discussed. It is, in the special circumstances presented by this record, the question now before this Court.

Appellee believes that the question will emerge in clearer perspective if it is recognized at the outset that, if Laughlin's conversations with Gross were lawfully overheard, then the means used to accomplish this end are entirely unimportant. And the fact that he conversations were recorded is likewise immaterial. "[W]e do not understand that the mechanical nature of the method of overhearing is now to be the guidepost in this area . . . We find no distinction between holding out the handset and permitting an outsider to hear through the use of an induction coil. Nor does the recording of this legally overheard conversation render the overhearing and divulging of the conversation improper." *Carbo v. United States*, 314 F.2d 718, 739 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). "[N]or does such testimony [by a third

fendants' private offices. It was argued that an intangible form of trespass was committed in that the device surreptitiously brought the government into a protected area. No such argument is available to appellant here.

party about a telephone conversation] become inadmissible simply because recorded or overheard by electrical or mechanical device." *Wilson v. United States*, 316 F. 2d 212, 213 (9th Cir. 1963). "[I]t seems clear that the recording of a telephone conversation is not distinguishable from permitting the entire conversation to be overheard by means of an extension telephone." *Ferguson v. United States*, 307 F. 2d 787, 789 (10th Cir. 1962), *cert. granted*, 374 U.S. 805 (1963), *remanded on other grounds* 375 U.S. 962 (1964). "[T]he only function served by the recording is to preserve a permanent and accurate record of the conversation." *Carnes v. United States*, 295 F. 2d 598, 602 (5th Cir. 1961), *cert. denied*, 369 U.S. 861 (1962). These authorities stand for the common sense proposition that an otherwise lawfully overheard conversation does not become tainted because it was recorded (here by an induction coil, a device which serves only to make both voices on the recording equally audible) and may thus be accurately reproduced in court.

A second point requires consideration at the outset of the argument. It is whether, where a conversation is overheard on an extension phone *without the consent of one of the parties thereto*, "interception" occurs within the meaning of the statute. The question is not wholly free from doubt. If it be answered in the negative, the present inquiry is at an end.

In *Goldman v. United States*, *supra*, two federal agents, by placing a 'detectaphone' with a delicate receiver against a partition wall, were able to hear what the accused said while talking over the telephone in his office. The accused was not aware of the device. The Supreme Court found no violation of Section 605.

"The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation.

What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission." 316 U.S. at 133.

With respect to the concept of interception, the Court said:

"As has been rightly held,¹⁶ this word [intercept] indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver." 316 U.S. at 134.

In 1957 the Supreme Court decided the *Rathbun* case.¹⁷ It there held that Section 605 did not require the exclusion in federal courts of the contents of a communication overheard on a regularly used telephone extension *with the consent of one party to the conversation*. Nothing was said in the opinion about the quality of the requisite consent. Nor was it held that the contents of a conversation overheard on a telephone extension *without the consent of one party* were inadmissible. Both before and after the *Rathbun* decision, however, most federal courts which have considered the matter have found the question of "interception" to be bound up with the question of consent by one of the parties. *Wilson v. United States*, *supra*; *Carbo v. United States*, *supra*; *United States v. Williams*, 311 F. 2d 721 (7th Cir. 1963); *Ferguson v. United States*, *supra*; *Carnes v. United States*, *supra*; *Barbour v. United States*, 105 U.S. App. D.C. 89, 264 F. 2d 375 (1959), *cert. denied*, 360 U.S. 905; *United States v. Bookie*, *supra*; *Rayson v.*

¹⁶ Citing *United States v. Yee Ping Jong*, 26 F. Supp 69 (W.D. Pa. 1939), and thereby impliedly rejecting the contrary definition of 'intercept' found in *United States v. Polakoff*, 112 F. 2d 888, 889 (2d Cir. 1940) ("... anyone intercepts a message to whose intervention as a listener the communicants do not consent."). See the concurring opinion of Judge Chase in *Reitmeister v. Reitmeister*, 162 F. 2d 691, 697 (2d Cir. 1947), for an expression of the view that the *Polakoff* decision did not survive the Supreme Court's decision in *Goldman*. In this connection see also *United States v. Bookie*, 229 F. 2d 130 (7th Cir. 1956). And see comprehensive note on meaning of "interception" as used in the Communications Act in 53 Mich. L. Rev. 623 (1955).

¹⁷ *Rathbun v. United States*, 355 U.S. 107 (1957).

United States, 238 F. 2d 160 (9th Cir. 1956); *Flanders v. United States*, 222 F. 2d 163 (6th Cir. 1955); *United States v. Alexander*, 218 F. Supp. 916 (W.D. Pa. 1963); *United States v. Pierce*, 124 F. Supp. 264 (N.D. Ohio 1954), affirmed, 224 F. 2d 281 (6th Cir. 1955); *United States v. Sullivan*, 116 F. Supp. 480 (D.D.C. 1953); *United States v. Lewis*, 87 F. Supp. 970 (D.D.C. 1950).¹⁸

Assuming, therefore, that the consent of one party, in this case Bernice Gross, must be shown in order to establish that appellant Laughlin's conversations were not unlawfully "intercepted", the facts relevant to the issue of consent will now be set forth.

Statement of Facts Relevant to Consent of Bernice Gross

A. First Appearance of Gross Before Grand Jury on March 1, 1963.

On the morning of March 1, 1963, Bernice Gross appeared under subpoena before the January 1963 Grand Jury. (Gross, it will be remembered, was an ex-policewoman with extensive prior experience in the field of criminal investigation.) An oath was administered and the scope of the inquiry being conducted was explained. After being advised of her privilege against self-incrimination by Assistant United States Attorney Harold Sullivan, Gross indicated a willingness to testify.¹⁹ She was asked, among other things, whether Allan U. Forte or anyone representing himself to be acting on Forte's behalf had either offered

¹⁸ For a local case holding that the recording of a telephone conversation, even by or with the consent of one of the parties, is a prohibited interception, see *United States v. Stephenson*, 121 F. Supp. 274 (D.D.C. 1954). There, however, a device was attached to the wiring of the bell box of the telephone at the receiving end, and Judge Pine held that this constituted an "interception," stating that "both in space and time, the taking in this instance was before the arrival of the communications at the destined place." 121 F. Supp. at 277. The interference with the means of communication is sufficient to distinguish that case from the instant one.

¹⁹ Page 4, transcript of testimony of Bernice Gross before the January 1963 Grand Jury on March 1, 1963, consisting of 11 pages.

or given her money or anything of value for any service or act on her part in connection with the alleged abortion on Jean Smith in 1961. She said no.²⁰

B. Interview of Mrs. Gross by Mr. Sullivan and Mr. Hannon on March 1, 1963.

After being excused as a grand jury witness, Gross remained in the courthouse where, at the request of Mr. Sullivan, she appeared at 12:17 p.m. in the office of Assistant United States Attorney Joseph Hannon. There, in the presence of a reporter, she was advised of her right to counsel and again reminded, by Mr. Sullivan, of her privilege against self-incrimination. What followed was a three-way discussion between Mr. Hannon, Mr. Sullivan, and Mrs. Gross which lasted for some two hours and the contents of which cover 64 pages of transcript. For purposes of this summary, that discussion may be treated as though it were divided in three parts.

(1) Between pages 1-19 of the transcript, it was represented to Mrs. Gross by Mr. Sullivan that he was in possession of certain facts and information which indicated that her morning's sworn testimony was false;²¹ that information was to the effect that she (Gross) had acted on behalf of Forte and his lawyer in paying certain witnesses, principally Jean Smith, to absent themselves or to lie on the stand in the Forte abortion trial.²² Mrs. Gross denied this, adhering to her previous statements that she didn't "know anything."²³ She was told that "the Grand Jury is in a position to be able to deliberate as to whether you committed perjury," and "it might be if it saw fit that the Grand Jury could indict you for perjury."²⁴ In this con-

²⁰ Pages 8-9, same transcript.

²¹ Pages 2-3, transcript of interrogation (word chosen by reporter) of Bernice Gross in Room 3439, United States Attorney's Office, United States Courthouse, Washington, D.C. on March 1, 1963.

²² Same, pages 2-3.

²³ Same, pages 2, 6.

²⁴ Same, pages 4, 13.

nection she was twice told that she was "in the switches."²⁵ It was explained that her cooperation was needed in ascertaining the truth concerning obstruction of justice in the Forte abortion trial;²⁶ in return for that cooperation nothing could be promised nor could any immunity be conferred;²⁷ however, Mr. Sullivan would ask the grand jury to consider her role as a government witness; he would say to the grand jury "give us this witness for trial; we need Mrs. Gross; without her we have got nothing; with her we have got something; indict the big fish and let Mrs. Gross be a government witness; without her we have got nothing."²⁸

Repeatedly Mrs. Gross asked what would happen to her if she told the truth.²⁹ In her own words, "I'm thinking about myself"³⁰ and "that's the only thing I'm interested in and, believe me, I don't care about anybody else."³¹

It was during this first phase of the interview that Mr. Sullivan first informed Mrs. Gross that, if she cooperated, he would ask her to telephone Forte's lawyer and to permit the conversation to be overheard on an extension phone. She neither assented to nor resisted the proposal.³²

(2) On page 19 of the transcript, Mrs. Gross agreed to tell the truth. The transition occurred as follows: "Let me say, as long as Jean [Smith]—as long as Jean told, I'm not going to hold it back. Believe me, she got more than I did. So if she told you, what the hell, it doesn't matter, I'll tell you what you want to know."

²⁵ Same, pages 6, 9. Mr. Sullivan later explained that by "in the switches" he had meant "that she was just like a train at the switches, she could go one way or she could go the other. She could either choose to tell a lie or she could choose to come forward with the truth" (Mot. Tr. 158-159).

²⁶ Same, pages 2-7.

²⁷ Same, pages 14-17.

²⁸ Same, page 7. To the same effect is page 9.

²⁹ Same, pages 5, 6, 12, 15, 17.

³⁰ Same, page 16.

³¹ Same, page 11.

³² Same, pages 17-18.

(3) Thereafter, between pages 19-64 of the transcript, Gross, responding to questions posed by Sullivan and Hannon, narrated the history of her past contacts with Forte and, to a lesser extent and never in person, with Laughlin. She admitted having received amounts of money from Forte; the money was for Jean Smith to "get her to change her story [about the abortion]".³³ Gross herself had "figured" that she would "get taken care of after the trial".³⁴ The subject of money had never come up in her conversations with Laughlin; she had no doubt, however, that Laughlin had known that money was being passed.³⁵ Laughlin had instructed her concerning the letters Jean Smith was to write.³⁶

Toward the end of this phase of the interview, the following colloquy occurred:³⁷

Mr. HANNON: Is he [Forte] going to call you tonight?

Mrs. GROSS: I guess he will.

Mr. HANNON: Can we have somebody there?

Mrs. GROSS: Sure.

Mr. SULLIVAN: You're agreeable to somebody being there?

Mrs. GROSS: Yes.

C. Second Grand Jury Appearance of Bernice Gross on March 1, 1963

On the afternoon of March 1, 1963, Mrs. Gross was recalled as a witness before the grand jury. She admitted that her previous testimony, to the effect that she had not been contacted by Forte or anyone in his behalf and had performed no service in connection with the abortion trial, had been false.³⁸ At the same time

³³ Same, page 35. And see page 40.

³⁴ Same, pages 35, 36, 39.

³⁵ Same, page 50.

³⁶ Same, pages 52, 55.

³⁷ Same, pages 59-60.

³⁸ Page 2, Transcript of testimony of Bernice Gross before the January 1963 Grand Jury on March 1, 1963, consisting of 7 pages.

she swore to the truth of the statements made by her in Mr. Hannon's office. It was represented to the grand jurors that a transcript of those statements would later be read to them.

Before being excused as a witness, the following exchange took place:³⁹

By Mr. SULLIVAN:

Q. Just before the Grand Jury then, one final thing. You did say, didn't you Mrs. Gross, that since you have come forward and told the truth now you would also be agreeable to having someone listen in on your extension phone tonight should Forte call you?

A. The only trouble with that is my husband doesn't know anything about this, and if somebody would have to tell him I——

Q. —I think in fairness I should advise you if this Grand Jury matter results in an indictment of anyone it is going to be public information anyway. The possibility of your husband learning is extremely great. You can think that over yourself as a practical person.

A. I still would not like it in my house, I wouldn't.

Q. You see, we have no legal way of doing it except in your house?

A. Well, I was not going to answer the phone this evening because I don't want to have anymore conversations, and I was going to New York today—that's my home—but I couldn't because I had to come here and I know I'm going tomorrow. I'm not answering the phone tonight and if he knows I'm here he's just liable not to call.

Q. I have no way of forcing the answer from you. It has to be your personal choice.

A. I don't.

Q. Do you have any objection of making a telephone call to Mr. Forte before leaving Washington and chat

³⁹ Same pages 4-6.

with him on the phone, as well as one with James Laughlin and chat with him on the phone.

A. I would rather not.

Q. I understand that you would rather not, but your cooperation——

A. —If I had to I would, but if I don't have to I would rather not.

Q. On the record, let me put this to you, all we want is the truth, you don't have to make those telephone calls?

A. I have told you the truth.

Q. Fine, but the thing we talked about on the record down in Mr. Hannon's office I'll say it right before the Grand Jury. I said to Mrs. Gross that the big fish behind an operation like this are the ones who are most guilty. The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between, that is the only way to make the case on the big people. We need Mrs. Gross' cooperation, and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation. You would not have to make the telephone call, you see my point?

A. I know your point very well. I understand your point very well.

Q. Mrs. Gross, you are an experienced policewoman?

A. I am, very.

Q. You know the point?

A. I realize your point but I say I would rather not. If I did not have to I would rather not. If I had to I would. There is nothing I can do.

DEPUTY FOREMAN: Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we

can. I think you can tell this witness, and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

Mr. SULLIVAN: Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

Thereafter, under the conditions already described, the first of the telephone calls to Laughlin was placed and taped.

D. Testimony of Bernice Gross and Harold Sullivan Before Judge Hart

Bernice Gross appeared as a government witness at the pre-trial hearing on appellants' motions to suppress evidence and dismiss the indictment. During her direct examination she stated that she hadn't been "willing" to make the telephone calls but rather had done "what I thought was best for myself." (Mot. Tr. 276). Asked to explain further, she responded as follows:

The WITNESS: Your Honor, when I say I—Mr. Lowther asked me if I was willing. It wasn't my idea to make the phone calls. I didn't want to make them but again I wasn't threatened if I didn't make them, that something would happen to me. I wasn't forced to do them. I felt that I would do—I was looking out for myself.

* * * * *

By Mr. LOWTHER:

Q. Let me ask you this, Mrs. Gross: When you made the phone calls, was it your free choice to make them?

A. Oh, yes.

Q. All right.

A. Yes.

Q. And maybe I missed—when I used the word willingly, I'm talking about free choice.

A. Free choice, yes.

Q. All right, now—

The COURT: Wait just a moment. Let me ask. When you said that you did not do it willingly, did you mean that it wasn't your idea to make them or that you did not want to make them?

The WITNESS: No, it wasn't my idea. I didn't come to the office that day to make the phone calls. I had no idea of making them.

The COURT: And is that what you meant by you were not willing to make them?

The WITNESS: Yes, that is my interpretation of willing.

The COURT: All right.

By Mr. LOWTHER:

Q. Very well. Now, let me ask you this. In regard to the phone calls, the subsequent ones of March 13th and March 18th, those phone calls, did you make those of your own free choice?

A. Yes, I did.

Q. All right, now, this question Mrs. Gross.

And for your information the tapes have been heard in chambers today, you have heard them yourself in open court. Are you willing as a party to those phone calls to have those tapes—provided of course that they were admitted—are you willing to have those tapes played before the Court and jury in this trial here?

A. It doesn't matter, yes.

On cross-examination Gross acknowledged that she had previously testified before Judge Youngdahl (in Criminal No. 599-63) that she felt she "had to cooperate" in making the calls to Laughlin (Mot. Tr. 282-283). By that she had meant: "I thought it would be best for me", and "best for me" in turn referred to the possible action the grand jury

might take in her case (Mot. Tr. 283-284). A desire to escape a perjury indictment was "one of the reasons" for her cooperation in the matter of the telephone calls (Mot. Tr. 285).

Harold Sullivan also was a witness at the pre-trial hearing. In substance, he testified that he had a conversation with Gross following her second appearance before the grand jury on March 1; that he asked her why, having expressed willingness to make the phone calls while in Mr. Hannon's office, she had suddenly become reluctant to do so; that she replied that her husband didn't know about her involvement in the Smith abortion case and that she feared a "domestic problem" if tape recordings were made at her home; and that she was agreeable to having the recordings made at the courthouse "out of the presence of her husband." (Mot. Tr. 124-127).

E. Finding

In this state of the evidence, and after a consideration of the various transcripts alluded to in paragraphs A, B, and C above, the trial judge found that the telephone conversations in issue were overheard with the consent of Bernice Gross (Mot. Tr. 299-303).

The Finding of Consent Was Supported by the Record and by Applicable Case Law and the Tape Recordings Were Properly Received in Evidence.

The events of March 1, 1963, were plainly not happy ones for Bernice Gross. It was a day full of hard decisions: whether to testify before the grand jury or to exercise her privilege not to; having elected to testify, whether to tell the truth and admit her guilt in a scheme to corruptly influence witnesses or to swear falsely and deny guilt; having lied and been caught at it, whether to cooperate with the government with the prospect of herself becoming an accusing witness or to refuse to cooperate with the prospect of herself being indicted for perjury; having chosen to cooperate, whether to allow telephone conversations with ap-

pellant Laughlin to be overhead and recorded. In each case decision lay between two distasteful alternatives. In an ideal world there would have been no such decisions or at least there would have been some third painless alternative. But not in the intensely real world of March 1. Mrs. Gross, a former policewoman, was deeply aware of these realities and dealt with them according to the dictates of a single practical precept. Again and again she wanted to know "what's going to happen to me." Self-interest was her paramount and overriding concern and the mainspring of her decisions. Clearly it was more to her advantage to cooperate in telling the truth than to persist in her perjury, when the latter course of action might lead to her own indictment. And if that cooperation encompassed making telephone calls to a partner in crime and permitting them to be overheard, nevertheless this was preferable to hazarding the other consequences of her wrongdoing. It is true that Mrs. Gross didn't volunteer to make the calls and in that sense was "unwilling" to do so. It is also true that she felt she "had to" make the calls in the sense that the logic of self-interest left her no other acceptable choice. Yet an act may be 'voluntary' without being volunteered; a choice which is disagreeable to make may nevertheless be a free one. Common experience tells us so. Having to pay taxes is unpleasant but being prosecuted for failure to do so is worse. Is the decision to pay therefore involuntary?

The situation would be altogether different had the cooperation of Bernice Gross been procured by illegal or improper conduct on the part of the grand jury or government officials. But it was not. The grand jury had a right to investigate charges of obstruction of justice. Mr. Sullivan had a right to ask material questions in connection with that investigation. Certainly neither the grand jury nor Mr. Sullivan can be held responsible in any meaningful way for the false testimony of Mrs. Gross. Moreover, having probable knowledge that Gross had perjured herself, Mr. Sullivan had an unassailable right to confront her with the evidence in his possession and to seek her co-

operation. The fact that it was in her best interests to offer that cooperation cannot be charged to any overreaching on the part of the government. Indeed the government acted at all times with a scrupulous attention and regard for the rights of Mrs. Gross.

The consent of Bernice Gross is not vitiated by the fact that the idea of making telephone calls to Laughlin did not originate with her, but rather was initiated by federal officials. "Government agents may create an opportunity for lawful eavesdropping and need not rely on accidental or natural opportunity." *Ferguson v. United States*, *supra*, 307 F. 2d at 789; *Anspach v. United States*, 305 F. 2d 48 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962). In numerous cases where the contents of an overheard conversation were received in evidence, federal appellate courts have validated the consent of one of the parties where that consent was obtained in circumstances analogous to those disclosed by this record.

In *Ladrey v. Commission on Licensure To Practice, Etc.*, 104 U.S. App. D.C. 239, 261 F. 2d 68 (1958 *en banc*), a telephone call was placed at police headquarters from one Matthews to appellant. "As Matthews knew" the conversation was overheard by a detective on an extension telephone. "Matthews told the appellant he had been questioned throughout the entire day by the police and that he was scared." At trial the detective was permitted to relate the details of the conversation, as well as those of a second call placed in the same manner. Admission of the evidence was sustained on appeal over appellant's claim that "Matthews' 'acquiescence' to Gosman's listening can hardly be equated with 'authorizing' him to listen." This Court said:

We must reject his contention. No one is bound to answer a ringing telephone. If he does pick up the receiver, he is not required to talk to the outside caller. If he chooses to talk, he may well understand that the calling party, the original "sender," may have others listening to the conversation, whether in a group around the caller's telephone or on an extension at-

tached to it. Quite apart from any such observations, the Supreme Court has passed upon the point,⁴⁰ adversely to appellant's claim. 104 U.S. App. D.C. at 243-244, 261 F. 2d at 72-73.

In *Flanders v. United States*, *supra*, narcotics agents listened on an extension phone to a conversation between one Merritt and appellant. Merritt had previously been arrested for a narcotics violation and was "prevailed upon" by the agents to place the call. The receipt of the agents' testimony concerning the conversation was upheld.

In *United States v. Bookie*, *supra*, officers entered one Hubbard's store and arrested him for possession of narcotics. Before leaving they heard the telephone ring. At the officers' direction, Hubbard answered, holding the receiver in such a position that one of the officers could overhear the incoming conversation. No violation of Section 605 was found. And for another case in which the monitored call was placed by a person under arrest, see *United States v. Pierce*, *supra*. See also *Wilson v. United States*, *supra*, *United States v. Williams*, *supra*, and *Ferguson v. United States*, *supra*, for cases in which the monitored call was placed by a government informant or special employee.

Most recently, in *McClure v. United States*, 332 F. 2d 19 (9th Cir. 1964), narcotic agents "procured the services" of one Hopping, a known addict who had been arrested for a narcotics violation in 1962. They promised to ask the United States Attorney that he not be prosecuted if he cooperated in making a telephone call to appellant. He did so, and the officers overheard the conversation on a "twin-phone". The Court found that Hopping's consent was freely given and therefore held that no statutory violation had occurred.

Matched against the circumstances which gave rise

⁴⁰ Citing *Rathbun v. United States*, *supra*, where the Supreme Court said that "one party may not force the other to secrecy merely by using a telephone." 355 U.S. at 110. "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation." 355 U.S. at 111.

to consent in the above cases, the circumstances in the instant case sufficiently supported the finding that the telephone calls which Bernice Gross made to appellant Laughlin were overheard with her consent.

Weiss v. United States, 308 U.S. 321 (1939), so heavily relied on by appellant, does not require that the finding of consent be overturned. There the telephone wires leading to appellant's offices were tapped for a period of months, and the intercepted messages were recorded. Prior to trial these recordings were made available to government agents and United States Attorneys. Upon being confronted with the recordings, many of the defendants charged in a mail fraud indictment pleaded guilty, became government witnesses, and were allowed to read transcripts of the taped conversations to the jury at trial. The Supreme Court, stating that "[t]he Act contemplates voluntary consent and not enforced agreement to publication," held that Section 605 was violated since the pre-trial divulgence of the recordings was not consented to by either of the parties to any of the conversations. 308 U.S. at 330. Obviously the Court was dealing with the question of divulgence of intercepted messages. Its holding has little or no bearing on the separate question, here involved, of whether a message has been intercepted at all.

Implicit in the *Weiss* decision is the recognition that a telephone communication, even though intercepted within the meaning of Section 605, may nevertheless be lawfully divulged if one of the parties consents.⁴¹ Cf. *McClure v. United States*, *supra*, 332 F. 2d at 22. Assuming *arguendo*, therefore, that the conversations between Gross and Laughlin were 'intercepted', their contents were nevertheless admissible since Gross voluntarily consented to their divulgence at trial (Mot. Tr. 278).

Appellee well recognizes that the law sometimes raises a presumption against consent, as for example where

⁴¹ The question whether Section 605 is violated if a message is intercepted but not divulged was reserved in *Rathbun v. United States*, *supra*, 355 U.C. at 108, n. 3.

it is sought to justify an otherwise unreasonable search on the basis of consent to search given by a defendant in custody. *Judd v. United States*, 89 U.S. App. D.C. 64, 190 F. 2d 649 (1951). Operating to create the presumption in such cases, however, is the well-known inference against the waiver of constitutional rights as well as the logical inference that a person having nothing to gain from the seizure of evidence against him would not consent to a search for such evidence. These considerations are obviously not present in the instant case. No constitutional rights, certainly not any inhering in appellant Laughlin, were involved. Moreover, Bernice Gross had very good reasons, apparent on the face of this record, to consent in the matter of the telephone calls. The rationale of the Fourth Amendment consent cases, wholly inapplicable to these facts, should not be imported to strike down the reliable and probative evidence secured through the cooperation of Bernice Gross.

Eavesdropping in any form carries with it the stigma of impoliteness and is not "cricket" in the realm of social intercourse. But the prevention and detection of crime is not a polite business and we see no need or justification for reading into the Fourth Amendment a standard of conduct for law enforcement officials which would leave society at the mercy of those dedicated to the destruction of the very freedoms guaranteed by the Constitution. *Anspach v. United States*, *supra*, 305 F. 2d at 51.

III. The doctrine of collateral estoppel did not preclude the government from litigating the question of whether Laughlin's telephone conversations were overheard and recorded with the consent of Bernice Gross.

It has been seen in Argument II, *supra*, that the admissibility of the tape recordings was contingent upon a finding of consent on the part of Bernice Gross. Appellant Laughlin contends that the doctrine of collateral estoppel operated to preclude such a finding. Evaluation of this

contention, with which appellee disagrees, necessarily involves a review of the prior judicial proceedings on which it is based.

Proceedings before Judge Youngdahl in Criminal No. 599-63

Trial in Criminal No. 599-63, in which appellant Laughlin was charged with perjury, began on October 1, 1963. At the outset of trial the government indicated that it intended to offer in evidence tape recordings of telephone conversations between Gross and Laughlin. (These were the same recordings which are involved in the present appeal.) After a hearing at which the only testimony presented was that of Assistant United States Attorney Harold Sullivan,⁴² Judge Youngdahl found that the recordings had been made with the voluntary authorization of Bernice Gross and were therefore admissible. Thereafter the tapes were played to the jury during the direct examination of Bernice Gross.

When asked for the first time during cross-examination whether the recordings had been made with her consent, Gross replied: "I felt I had to cooperate."⁴³ At this point a second hearing on the question of consent was held out of the presence of the jury. Testimony taken from Bernice Gross at that hearing covers six (6) pages of transcript.⁴⁴ On the basis of that testimony and after a reading of the transcript of the 'interrogation' of Bernice Gross in Mr. Hannon's office and of the testimony given by her at her second appearance before the grand jury on March 1, 1963, Judge Youngdahl concluded that Mrs. Gross' agreement to the recordings had been induced by an implied promise of leniency. He further concluded that such agreement under these circumstances was not the "voluntary consent"

⁴² Bernice Gross was not called as a witness by the government and Laughlin presented no testimony. At the time of this hearing, however, Judge Youngdahl made a request for the relevant grand jury transcripts (p. 4, transcript of proceedings before Judge Youngdahl in Criminal No. 599-63 on October 2, 1963).

⁴³ Page 160, transcript of proceedings before Judge Youngdahl on October 7, 1963.

⁴⁴ Pages 161-162, 170-174, same transcript.

contemplated by the Communications Act, relying on *Weiss v. United States, supra*. Reversing his previous decision, Judge Youngdahl ruled the tapes inadmissible and, rejecting the idea that the jury be instructed to disregard them, declared a mistrial. His opinion is reported at 222 F. Supp. 264.

Proceedings before Judge Curran in Criminal No. 599-63

On October 30, 1963, Laughlin filed a motion to dismiss the indictment in Criminal No. 599-63. The identical motion was made in Criminal No. 600-63. The motions stated that the indictments should be dismissed "for the reason that there was no competent and credible evidence before the Grand Jury on which to base an indictment." Argument was made in the motions that Judge Youngdahl's ruling was the law of the case as to the admissibility of the tape recordings, and in an attached affidavit Laughlin set forth portions of the "interrogation" of Bernice Gross in Mr. Hannon's office on March 1, 1963, and portions of the proceedings before Judge Youngdahl. On October 30, 1963, Laughlin also filed, in both Criminal Nos. 599-63 and 600-63, a motion to impound the tape recordings.

On October 31, 1963, the government filed, in both 599-63 and 600-63, an opposition to appellant's motion to impound the tapes. It alleged therein that there were matters on the tapes which had no connection with the pending indictments. On October 31, 1963, the government also filed, in both 599-63 and 600-63, its opposition to appellant's motions to dismiss the indictments therein. The government argued in its opposition that there was competent evidence before the grand jury, to wit, the testimony of Bernice Gross and telephone records showing person-to-person and station-to-station calls between Gross and Laughlin. For this reason, it was urged, even assuming *arguendo* that tainted and unlawful evidence had been before the grand jury, the indictment should nevertheless not be dismissed. Attached to the opposition was an affidavit of Harold Sullivan concerning the evidence which had been before the grand jury.

On November 1, 1963, Laughlin's motions were argued before Judge Curran. No testimony was taken in connection with these motions.

On November 8, 1963, the government filed, in both 599-63 and 600-63, a supplemental opposition to the motions to dismiss. It therein set forth that the review of the transcripts of the grand jury testimony of Bernice Gross, Jean Smith, and Dorothy Birge would establish that competent evidence had been before the grand jury.

On November 13, 1963, Judge Curran decided the motions in an opinion reported at 223 F. Supp. 623. In that opinion Judge Curran reiterated the facts, as they appeared in the opinion of Judge Youngdahl, relevant to the issue of whether Bernice Gross had consented to the recording of her conversations with Laughlin. 223 F. Supp. at 624-625. He concurred in Judge Youngdahl's conclusion that Gross had not given her voluntary consent within the meaning of the Communications Act, also relying on *Weiss v. United States, supra*. He held that, excluding the tape recordings, there was otherwise insufficient evidence to support the perjury indictment (599-63), and he therefore ordered it dismissed. At the same time he denied the motion to dismiss 600-63 and denied the motion to impound the tapes. 223 F. Supp. at 626.

The government filed a motion to reconsider and vacate the order of November 13. It urged therein that, even excluding the recordings, there was sufficient corroborative evidence of perjury and, in the alternative, that the court had erroneously applied a trial rule of evidence in dismissing the indictment. Judge Curran rejected both contentions. *United States v. Laughlin*, 226 F. Supp. 112 (D.D.C. 1964).

An appeal noted by the government from the dismissal of the indictment in 599-63 was dismissed on motion of the government on April 8, 1964.

Such was the extent and nature of the relevant prior judicial proceedings when this case, Criminal No. 600-63, reached Judge Hart for trial on April 14, 1964. First order of business before Judge Hart was disposition of appellants' motion to suppress evidence, filed April 1, 1964,

wherein they asked that a full evidentiary hearing be held which, so the motion alleged, would clearly show: "A. That the evidence received by the Grand Jury in this cause was in violation of the Federal Communications Act."

Neither the determination of Judge Youngdahl nor the determination of Judge Curran was conclusive on the question whether Bernice Gross consented to the recordings.

The doctrine of collateral estoppel is of course fully applicable to criminal proceedings. *Sealfon v. United States* 332 U.S. 575 (1948). It is not, however, applicable in the circumstances disclosed by this record. This may be clearly perceived by considering separately the prior judicial determinations of Judges Youngdahl and Curran.

Judge Youngdahl's declaration of a mistrial in Criminal No. 599-63 was a non-final, non-appealable order. It was interlocutory in character and therefore had no collateral consequences whatever. The rule involved, that an interlocutory ruling rendered during the course of a criminal proceeding has no preclusive collateral effects, is most often expressed in connection with motions to suppress evidence. *United States v. Wallace and Tiernan Co.*, 336 U.S. 793, 802 (1949) ("[A] decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case."); *Homan Manufacturing Co. v. Russo*, 233 F.2d 547, 549-550 (7th Cir. 1956); *United States v. Physic*, 175 F.2d 338, 339 (2d Cir. 1949); *United States v. One 1946 Plymouth Sedan Automobile*, 167 F.2d 3, 8 (7th Cir. 1948) ("a proceeding to suppress is not the basis of judgment when brought after indictment as part of the criminal proceeding. It is only a procedural step involving the admissibility of evidence in the criminal proceeding. It decides only that motion. It is interlocutory and not appealable."). The conclusion reached in each of these cases is that orders either granting or denying motions to suppress evidence are not determinative of the legality of or of the facts surrounding the

method of obtaining the evidence. A like conclusion is required here. The order declaring a mistrial was interlocutory only and thus insufficient to preclude the government from disproving the facts as Judge Youngdahl found them to be.

Judge Curran's order dismissing the indictment in Criminal No. 599-63 stands on a different footing. It was a final, appealable judgment and as such was conclusive between the parties as to all matters *actually litigated therein and necessarily determined thereby*.

"[In an estoppel situation] the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action." *Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, 623 (1933).

"[a] judgment operates as an estoppel only as to matters in issue . . . and actually determined in the original suit." *Troxell v. Delaware, Lackawana & Western R.R. Co.*, 227 U.S. 434, 440 (1913).

"[T]he inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action." *United States v. International Building Company*, 345 U.S. 502, 505 (1953).

"That doctrine [collateral estoppel] makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision." *Yates v. United States*, 354 U.S. 298, 336 (1957), and cases there cited.

Moreover, before a fact or issue will be concluded, it is necessary that the record of the former suit "show with certainty" that that fact or issue was "indeed litigated and decided on the merits." *Kelliher v. Stone & Webster*, 75 F. 2d 331, 333 (5th Cir. 1935). "It is of the essence of

estoppel by judgment that it is certain that the precise fact was determined by the former judgment." *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895).

Applying these principles to the instant case, it is apparent that the question of Gross' consent in the matter of the tape recordings was not put in issue before Judge Curran and was neither litigated nor determined by him. (1) That the question was not put in issue may be seen from the pleadings: the only issue joined on those pleadings was whether, assuming the tape recordings to be inadmissible, there was sufficient competent evidence to support the indictment. Certainly Laughlin, who in his motion argued law of the case as to the tapes, was not seeking to place their admissibility in issue. (2) That the matter was not litigated may be seen from the absence of an evidentiary hearing. Judge Curran had before him solely a question of law. He could not deprive the government of its right to disprove the facts found by Judge Youngdahl simply by adopting those facts in his opinion. (3) That the question of consent was not conclusively determined is apparent from the fact that such a determination was not essential to the judgment; Judge Curran had only to decide whether, *assuming* there was no consent and the tapes were excludable, the indictment should be dismissed.

Still other reasons argue against an estoppel by judgment on the issue of consent. "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding." *Yates v. United States*, *supra*, 354 U.S. at 338. The consent of Bernice Gross was obviously not an ultimate fact in Criminal No. 600-63. It was evidentiary fact only, as to which the doctrine of collateral estoppel is inoperative. *Yates v. United States*, *supra*; *The Evergreens v. Nunan*, 141 F. 2d 927 (2d Cir. 1944). Finally, the intent of Judge Curran to limit the effect of his order to Criminal No. 599-63 may be inferred from his denials of Laughlin's motions to dismiss the indictment in Criminal No. 600-63 and to impound the tapes.

IV. None of the evidence tending to establish the existence of a conspiracy or appellants' participation therein was objectionable as hearsay.

(See Tr. 261, 302, 1153-1154)

Appellants devote much space (Br. 37-55) to their argument that the case against them consisted of inadmissible hearsay evidence which should have been excluded. That argument proceeds as follows: (1) that since Gross was named as a co-conspirator, her testimony against them was inadmissible in its entirety according to the evidentiary rule that post-conspiracy statements are admissible against the declarant only; (2) that since Mrs. Gross was a co-conspirator, hearsay declarations made by her during and in furtherance of the conspiracy were admissible against them only if there was independent evidence of their participation in that conspiracy; that there was no such independent evidence and that Gross' hearsay declarations, as given in evidence by Jean Smith, was inadmissible in their entirety; (3) that Laughlin's post-conspiracy statements (the tapes) were not admissible against him. In essence what appellants contend is that *all* the evidence against them should have been excluded. No more specious argument can be imagined.

The live testimony of Bernice Gross

It is quite true that post-conspiracy statements are admissible against the declarant only. *Delli Paoli v. United States*, 352 U.S. 232, 237 (1957); *Krulewitch v. United States*, 336 U.S. 440 (1949). The reason for the rule is that the agency existing among the co-conspirators ends with the conspiracy. Since each co-conspirator is thereafter without authority to speak for the others, he is likewise powerless to make any statements admissible against the others under an exception to the hearsay rule. *Lutwak v. United States*, 344 U.S. 604 (1953). It is perfectly obvious that the rule is not a bar to the reception of live courtroom testimony by one co-conspirator against

the others. Such testimony is not hearsay and its admission does not depend on any theory of agency or exception to the hearsay rule.

Appellants seemingly make the additional argument (Br. 40-54) that the incriminating admissions made by Mrs. Gross before the grand jury and in Mr. Hannon's office on March 1, 1963, were inadmissible against them. Perhaps so,⁴⁵ but the point is hypothetical because these admissions were no part of the government's evidence at trial.

The testimony of Jean Smith

Much of Smith's testimony related to her conversations with the co-conspirator Gross in which appellants were implicated in the conspiracy. Appellants argue (Br. 39) that this testimony should have been excluded because there was no substantial evidence tending to establish their participation in the conspiracy.

Again appellants move from a valid premise to an absurd conclusion. It is true that a conspirator can only be convicted upon substantial proof of his own words and deeds and not alone upon hearsay declarations of a co-conspirator. *Glasser v. United States*, 315 U.S. 60, 75 (1942); *United States v. Russano*, 257 F. 2d 712, 713 (2d Cir. 1958). Here, however, appellants' convictions did not rest on Gross' hearsay declarations. They rested on her live testimony in court which, if believed, was sufficient to establish their guilt beyond any doubt whatever.

The post-conspiracy statements of appellant Laughlin

Twice during the trial the jury was instructed that any statements made by one defendant after the conspiracy had ended were admissible only against the declarant, only in the event a conspiracy was found to have existed, and only for the limited purpose of connecting that declarant with the conspiracy (Tr. 261, 302). The first of these in-

⁴⁵ Had these prior admissions been offered, they would perhaps have been objectionable as prior consistent statements of the witness Gross but not, as appellants suggest, as post-conspiracy statements.

structions related specifically to the taped post-conspiracy telephone conversations between Gross and Laughlin. Included in the final charge to the jury was the following instruction (Tr. 1153-1154):

This Court admitted in evidence certain tape recordings of alleged telephone calls between Bernice Gross and defendant Laughlin on March 1, March 13 and March 18, 1963, the same covering a period of time after the alleged conspiracy ended.

I caution you again that this evidence, being Government's Exhibits 11, 12 and 13, is not admissible and may not be considered by you in any way against the defendant Forte. This evidence may be considered against the defendant Laughlin only, and then only for the purpose of connecting Laughlin with the conspiracy if you should find that one had been entered into.

Further, I instruct you that this particular evidence is not to be considered on the question of whether or not the conspiracy existed but only as bearing on the question of whether the defendant Laughlin was a part of any conspiracy that may have previously existed as alleged in the indictment if you find from other evidence adduced in the case that such conspiracy in fact existed.

To appellant Laughlin's claim that the instruction was erroneous, it need only be said that the law is otherwise. *Delli Paoli v. United States*, *supra*, 352 U.S. at 237; *Lutwak v. United States*, *supra*, 344 U.S. at 618.

V. Appellants' motions to dismiss the indictment were properly denied

(See Mot. Tr. 29, 212, 214-215, Tr. 314, 544, 549, 582, 598-599, 604-605)

In addition to the motion to dismiss the indictments in both Criminal No. 599-63 (the perjury case) and Criminal No. 600-63 (this case), filed on October 30, 1963, and denied

by Judge Curran as to this case, *United States v. Laughlin*, *supra*, 223 F. Supp. at 626, appellants made two motions to dismiss the present indictment. The first of these, alleging bias on the part of the grand jury, was filed on April 1, heard on April 14-15, and denied on April 15, 1964 (Tr. 314). The other, alleging abuse of grand jury process by the government, was filed during trial on April 22, 1964, and denied after hearing the same day (Tr. 604-605). Appellants now urge (Br. 102-116) that both motions should have been granted and, in the conclusion of their brief, ask that the case be reversed with instructions to dismiss the indictment. Appellee submits that both motions to dismiss were without a particle of substance.

The motion of April 1, 1964, alleging grand jury prejudice

Both at the pre-trial hearing on this motion and now on appeal appellants have relied on the following facts in support of their allegation that the indictment was returned by a biased grand jury: that on March 26, 1963, Detective Samuel Wallace⁴⁶ appeared as a witness before the grand jury and was asked by Assistant United States Attorney Harold Sullivan whether "as a result of certain information which came to the attention of the United States Attorney from Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin that Jean Smith of the Baltimore area had a record or a reputation as a call girl or prostitute?";⁴⁷ that Wallace replied that he

⁴⁶ With respect to Wallace, appellants urge (Br. 117-119) the additional point of error that the trial court violated the 'rule of completeness' in excluding various attempted references to him. They misconstrue the rule. "The general phrasing of the principle, then, is that when any part of an oral statement has been put in evidence by one party, the opponent may afterwards (on cross-examination or re-examination) put in the remainder of what was said on the same subject at the same time." 7 Wigmore, *Evidence* §2115 (3d ed. 1940). (Emphasis supplied.) In no instance was this rule violated as to Wallace.

⁴⁷ Page 27, transcript of testimony of Samuel Wallace, Joyce Johnson, and Theodore Johnson before the January 1963 Grand Jury on March 26, 1963.

had checked out the story and had ascertained that Jean Smith's police record consisted of one drunk and disorderly charge in early 1962;⁴⁸ that before Wallace was excused as a witness one of the grand jurors remarked: "Mr. Laughlin seems to be throwing around an awful lot of accusations.";⁴⁹ that one of the grand jurors also remarked: "This man Laughlin has made a charge.";⁵⁰ that during this same session one of the grand jurors commented: "I think we should be awfully careful before we get into the record any aspersions or any innuendoes, because I think this Grand Jury wants to hold this testimony on a little higher standard than Jim Laughlin's concept of trying a law case.";⁵¹ that, while appearing as a witness in his own behalf at the pre-trial hearing on the motion to dismiss, Laughlin testified: "At no time did I represent to Mr. Sullivan that I had information to the effect that she (Jean Smith) was a call girl." (Mot. Tr. 29).

The inference most favorable to Laughlin which may be drawn from these facts is that Mr. Sullivan made deliberately false statements concerning him before the grand jury. In this posture of the case, however, Laughlin is not entitled to the benefit of that unlikely inference.⁵² Mr. Sullivan testified at the hearing that he had in fact received "information of a derogatory nature on Jean Smith, that she was a prostitute," and that Laughlin was the source of that information⁵³ (Mot. Tr. 212, 214-215). That being true (and the trial court was in a position

⁴⁸ Same, pages 27-28.

⁴⁹ Same, page 28.

⁵⁰ Same, page 29.

⁵¹ Same, page 30.

⁵² Appellee thus passes the question whether, even if it could be shown that the grand jury was influenced by government-instigated prejudice, the indictment would fall. *Gorin v. United States*, 313 F. 2d 641, 645 (1st Cir. 1963), suggests that an indictment is not subject to attack on this ground. So does *United States v. Smyth*, *infra*, 104 F. Supp. at 301.

⁵³ Appellants mistakenly state in their brief (Br. 106) that Laughlin's testimony in this matter was uncontradicted.

to determine credibility) Mr. Sullivan had a clear right to attempt a verification of that information and place his findings before the grand jury. "He (the Assistant United States Attorney) had power to give them (the grand jury) any documents and make any oral communications that he thought pertinent in the investigation of any crimes which the grand jury or he believed might have been committed . . ." *United States v. Smyth*, 104 F. Supp. 283, 306 (N.D. Cal. 1952). "A grand jury that begins the investigation of what may be found to be obstructions of justice opens up all the ramifications of the particular field of inquiry." *United States v. Johnson*, 319 U.S. 503, 510 (1943). And see generally, for the power of a federal grand jury to seek and obtain information from any source, including an Assistant United States Attorney, *Hale v. Henkel*, 201 U.S. 43, 63-65 (1906); *United States v. Smyth*, *supra*; Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 431-432 (1959).

The motion of April 22, 1964, alleging abuse of grand jury process by the government

During cross-examination, Bernice Gross stated that, at the request of Mr. Sullivan, she had come without subpoena to the District of Columbia in March, 1964, and had appeared before a grand jury (Tr. 544, 549). Soon forthcoming was appellants' motion to dismiss the indictment (Tr. 582). It alleged, in substance, that the grand jury had been improperly used as an instrument of discovery to prepare the present case for trial. A hearing followed, at which Mr. Sullivan testified that the appearance of Gross before the grand jury in March, 1964, was in connection with an investigation of possible charges of perjury against Laughlin⁵⁴ (Tr. 598-599). The

⁵⁴ It appears that the perjury charges being considered were the same as those contained in the indictment (Criminal No. 599-63) dismissed by Judge Curran in 1963. *United States v. Laughlin*, *supra*, 223 F. Supp. 623. Of course the dismissal in Criminal No. 599-63 was no bar to reindictment in that case. *Robinson v. United*

trial judge read the transcript of Gross' testimony before the grand jury in March, 1964.⁵⁵ He found that this grand jury was not "being used for the sole or dominating purpose of preparing the indictment in the case at bar for trial" and therefore denied the motion to dismiss (Tr. 604-605). His action in this regard was unquestionably correct. *United States v. Dardi*, 330 F. 2d 316, 329 (2d Cir. 1964); *In Re Grand Jury Investigation (General Motors Corp.)*, 32 F.R.D. 175 (S.D. N.Y. 1963); *United States v. Pack*, 150 F. Supp. 262 (D. Del. 1957). Moreover, even if it be found that the sole purpose of a grand jury investigation is to gather evidence for use in a pending case, the proper judicial course of action is to restrain the investigation, not to dismiss the pending indictment. *In Re Grand Jury Investigation*, *supra*, 32 F.R.D. at 183; *United States v. Pack*, *supra*, 150 F. Supp. at 264.

CONCLUSION

Appellants complain that the trial of this case was marked by fundamental unfairness. We believe a careful reading of the record will establish exactly the opposite to be true.

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

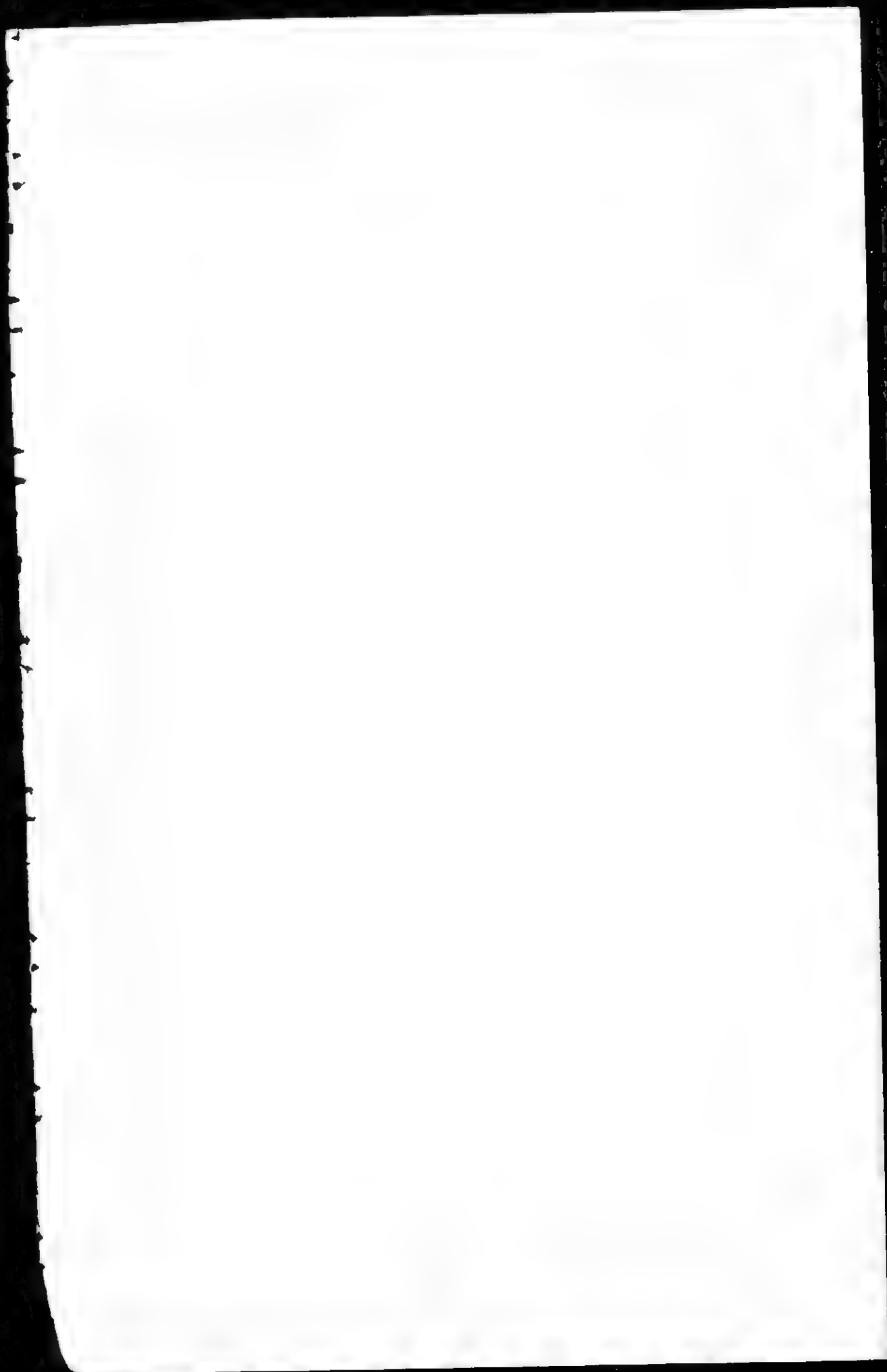
DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
ANTHONY A. LAPHAM,
Assistant United States Attorneys.

States, 284 F. 2d 775 (5th Cir. 1960); *Nolan v. United States*, 163 F. 2d 768 (8th Cir. 1947); *Amrine v. Tines*, 131 F. 2d 827, 834 (10th Cir. 1942).

⁵⁵ Transcript of testimony of Bernice Gross before Grand Jury on March 19, 1964.

APPENDICES



APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
Washington 1, D.C.

Chambers of
Matthew F. McGuire
Chief Judge

April 6, 1964

MEMORANDUM

By agreement of the Judges involved they will rotate their regular assignment for the months of April, May and June as follows:

April

Motions No. 2	Judge Jones
Criminal No. 5	Judge Hart
Civil Jury No. 4	Judge Walsh

May

Motions No. 2	Judge Walsh
Criminal No. 5	Judge Jones
Civil Jury No. 4	Judge Hart

June

Motions No. 2	Judge Hart
Criminal No. 5	Judge Jones
Civil Jury No. 4	Judge Walsh

/s/ MATTHEW F. MCGUIRE
Chief Judge.

APPENDIX B

COURTROOM LOG OF JUDGE HART

Court-month: April, 1964

- April 7 Began sitting in Criminal as per Memorandum of April 6, 1964, from Chief Judge McGuire relative to Assignments. U. S. v. Taylor, Cr. No. 1228-63. Trial begins. (Forgery & Uttering)
- April 8 U. S. v. Taylor (Continued)
Defendant plead guilty to False Pretenses; Jury dismissed. U. S. v. Boddie, Cr. No. 132-64. Trial begins. (Housebreaking & Larceny)
- April 9 U. S. v. Boddie (Continued)
Jury returns verdict of guilty.
- April 10 Sentences; Motions in Criminal cases
(See Appendix A)
- April 13 U. S. v. Edward T. Carter and Norman F. Carter Cr. No. 143-64 (Robbery). Trial begins.
- April 14 U. S. v. Carter, et al (Continued)
Jury returns verdict of not guilty as to Edward T. Carter; guilty as to Norman F. Carter.
U. S. v. Laughlin and Forte, Cr. No. 600-63
(Conspiracy, influencing witness). Sent for trial.
Motion to dismiss; to suppress evidence pending; Hearing begun on Motions.
- April 15 U. S. v. Laughlin and Forte (Continued)
Motion to dismiss, to suppress evidence—denied.
- April 16 U. S. v. Laughlin and Forte (Continued)
Affidavit of prejudice filed and denied. Jury sworn.
- April 17 U. S. v. Cobb, Cr. No. 1049-63
Mental Competency Hearing.
U. S. v. Harold Parker, Cr. No. 113-64
Motion for Judgment N.O.V.; new trial.
U. S. v. Laughlin and Forte—Trial continues.
- April 20 }
21, 22 } U. S. v. Laughlin and Forte—Trial continues.
23 }
- April 24 U. S. v. Curtis H. Desmond, Cr. No. 169-64
Sentence.
U. S. v. Laughlin and Forte—Trial continues.
- April 27 }
28, 29 } U. S. v. Laughlin and Forte—Trial continues; Jury returns
verdict of guilty.
- April 30 In Chambers.
- May 1 U. S. v. Harold Parker, Cr. No. 113-64
Sentence.
U. S. v. Owens, Cr. No. 125-64
Motion for Mental Examination.
U. S. v. Eldridge, Cr. No. 183-64 (Robbery)
Trial begins.
- May 4 U. S. v. Eldridge—Trial continues; Jury returns verdict of guilty.
- May 5 Begin sitting Civil Jury as per Memorandum of April 6, 1964, from Chief Judge McGuire, relative to Assignments.

Appendix A (of Appendix B)

Judge Hart

April 10, 1964
at 10:00 A. M.

SENTENCES

33-64	George F. Brandau	Treanor	Thomas R. Jones	Jail
611-63	Raymond F. Lein	Lindemann	Paul R. Kramer	Jail
	(Hearing on violation of probation.)			

MOTIONS

150-64	Ora F. Moore	Sullivan	Al Phillip Kane	Jail
	(Motion to dismiss indictment & affidavit in support of application for leave to proceed without prepayment of costs.) (By Deft.)			
220-64	Everett K. White	Rezneek	Addison Bowman	Bond
	(Motion for relief from pre-judicial joinder.)			
135-64	Walter E. Lewis	Sullivan	Stanley M. Dietz	Bond
	(Motion to suppress evidence.)			
164-64	Leon I. Williford	Perry	Gordon J. Quist	P. Bond
	Howard S. Smith		Bernard M. Dworski	Jail
	(Motion to suppress evidence.)			
169-64	Curtis H. Desmond	Sidman	Paul E. Miller	Jail
	Roland F. Vency, Jr.	Lowther	Eugene E. Siler	Jail
	(Motion to suppress evidence.)			
50-64	Howard R. Baylor		Robert H.S. French	Jail
	(Motion for suppression of evidence and motion for separate trial.) (By Deft.)			
	(Motion to suppress evidence.)			
51-64	Roland F. Vency, Jr.	Lowther	Eugene E. Siler	Jail
	(Motion to suppress evidence.)			
43-64	Louis M. Ray	Edelhertz	Sidney S. Sachs	P. Bond
	(Motion for bill of particulars. Motion for discovery. Motion to dismiss indictment obtained in violation of Defts. constitutional rights. Motion to dismiss counts 2 and 3. Motion to transfer. Motion for return of seized property and suppression of evidence.)		James D. Sparks	

REPLY BRIEF

IN THE UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

No. 18,711

JAMES J. LAUGHLIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 18,712

ALLAN U. FORTE,

Appellant,

v.

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA,

FILED NOV 4 1964

Appellee.

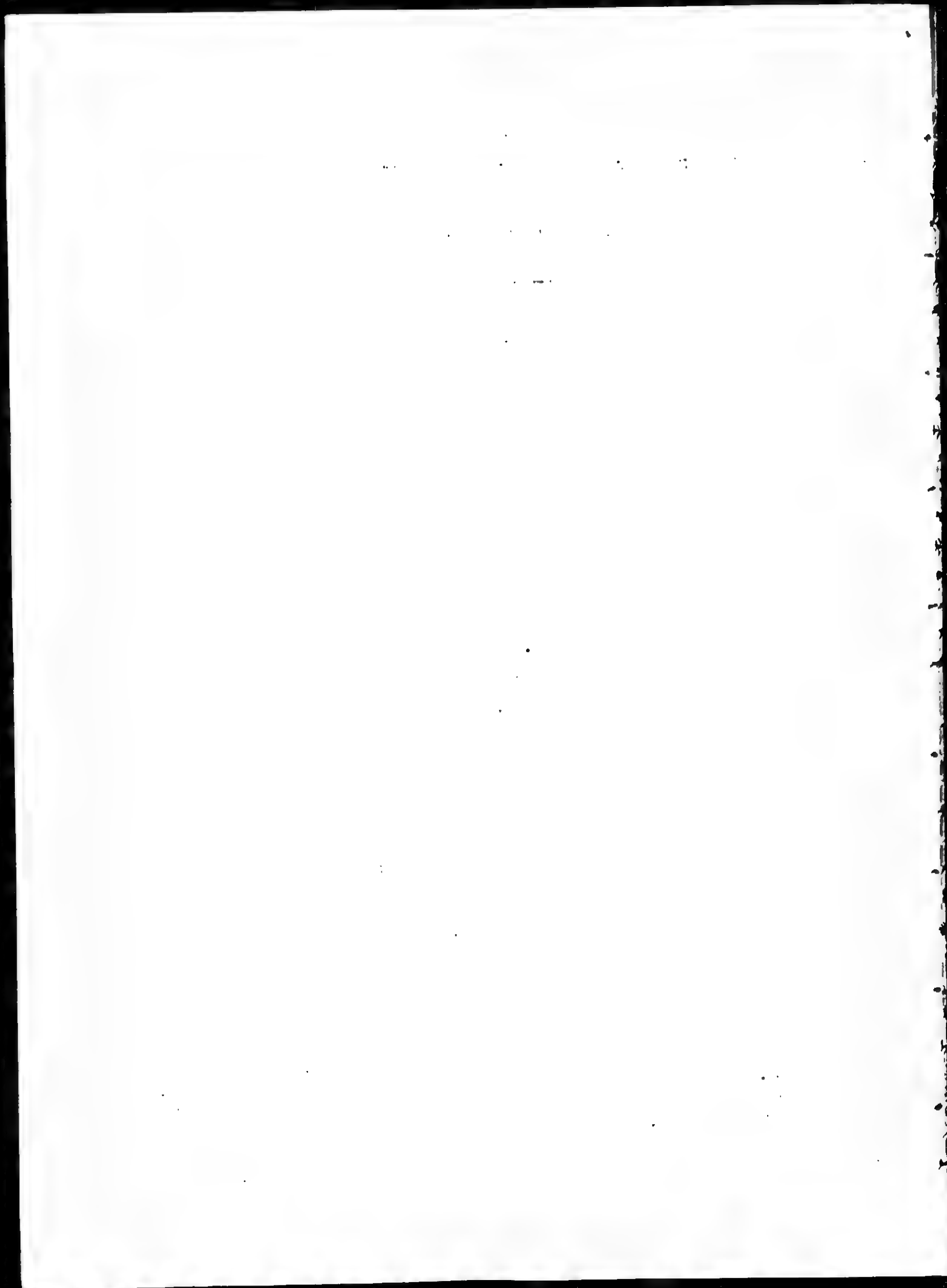
Nathan J. Paulson
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Of Counsel

William J. Garber
412 Fifth Street, N.W.
Washington 1, D. C.

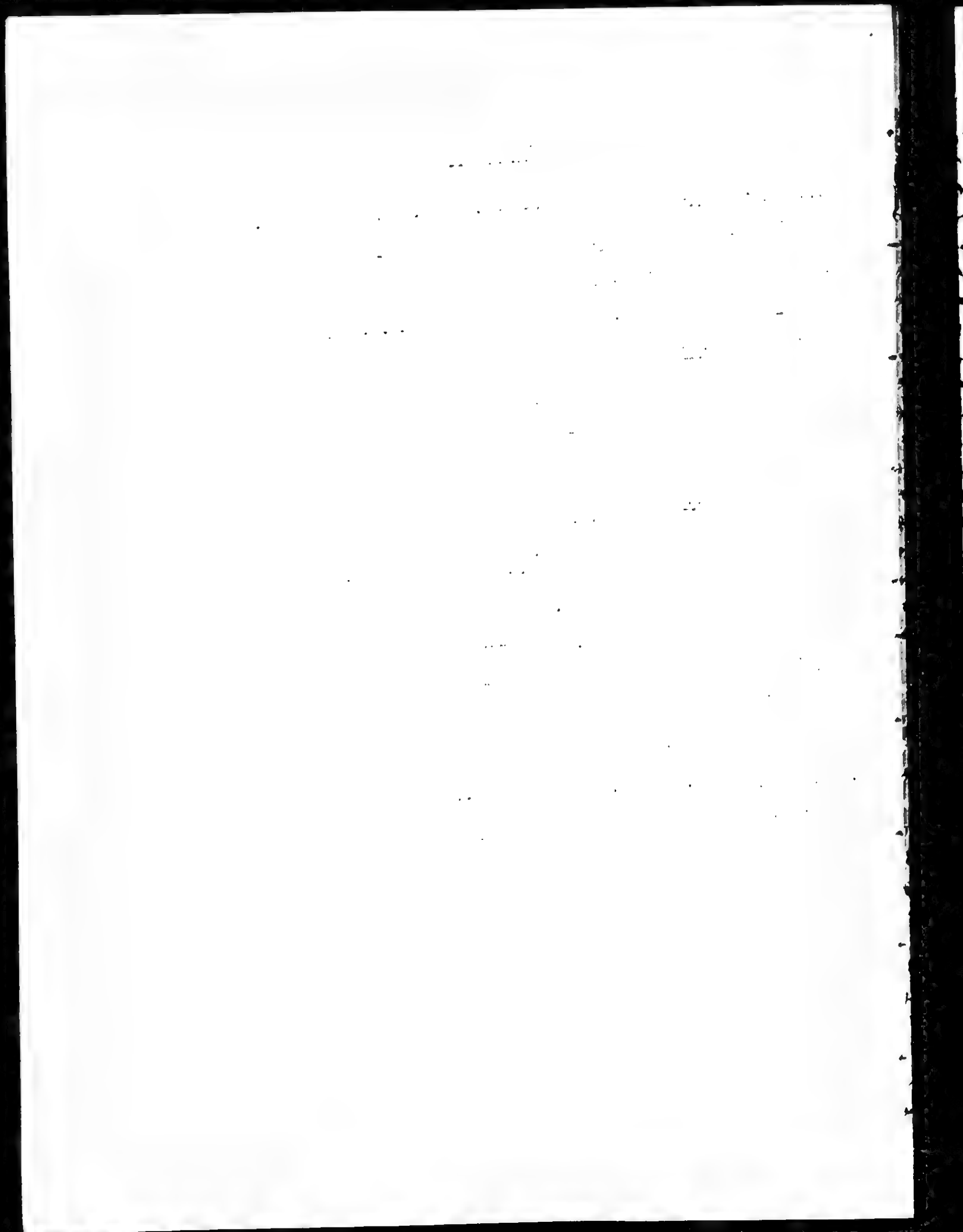
JAMES J. LAUGHLIN
National Press Building
Washington, D. C.
Counsel for Appellants



(1)

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REPLY BRIEF

In this reply brief we will attempt to answer certain matters raised in the Government's brief and in addition, will endeavor to furnish this Court with certain information referred to at the time of argument.

As to the matter of the recordings, we believe this is already fully covered in the original brief. We believe it is only necessary to say the recordings were not admissible under any theory in that Judge Youngdahl and Judge Curran had held that the recordings were obtained in violation of the Federal Communications Act and particular reference was made to Weiss v. United States, 308 U.S. 321.

We have set forth in considerable detail in the original brief Judge Youngdahl's comments before his final ruling and we believe it is quite significant when on two occasions he stated that he was "shocked" when he read the proceedings before the Grand Jury containing the statement of the Deputy Foreman and the statements of Assistant United States Attorney Sullivan. True it is that Judge Youngdahl's order was not appealable in that it was not a final order. However, it must not be overlooked that all the proceedings before Judge Youngdahl were before Judge Curran. In addition there were before Judge Curran the necessary Grand Jury proceedings. Judge Curran's ruling, therefore, was a final order and appealable. Hence, in that sense, Judge Youngdahl's order was also appealable. Had there been no attempt on the part of the Government to appeal, there is a possibility that the Government might argue, with some standing, that the Government was not bound. However, the Government did appeal from Judge Curran's ruling. The records of this Court so show. The record on appeal was prepared with considerable care. The records will show that on two occasions the United States Attorney asked this Court to grant an extension of time to comply with certain rules of this Court relating

to appeals. The Government then dropped its appeal. Therefore there is not the slightest question that the Government is estopped. In 56 Harvard Law Review 1, 23 and 24, we find this:

"Where a judgment is rendered against a party and he does not carry the case to a higher court, the judgment is conclusive in subsequent controversies between the parties as to matters actually litigated and determined even though the judgment was erroneous."

As a matter of fact this Court in No. 17,828, Travers v. United States, has had occasion to speak on this subject. We also desire to say that in Re-statement, Judgments Section 69 (1942 Ed.) there is a comment on Subsection (2) as follows:

"e. Where a party has a right to appeal but fails to do so. Where a final judgment has been rendered by the court of first instance and the unsuccessful party has a right to have the judgment reviewed by the appellate court but fails to appeal, the judgment is conclusive in a subsequent action on a different cause of action as to questions of fact actually litigated and determined by the judgment. The judgment is conclusive even though an appeal is pending unless the taking of the appeal operates to vacate the judgment (See Sec. 41, Comment d)."

Clearly under all the circumstances the order of Judge Curran was a final one and since the Government availed itself of the right to appellate review and then abandoned the appeal, the matter is settled.

If under any theory it can be argued that the trial judge in this case was not bound by the ruling of Judge Curran and Judge Youngdahl, that notion is quickly dissipated when we refer to the circumstances under which the recordings were made. It will be seen that in the instant case the involuntariness of the consent was set forth in much greater detail than it was in the courtroom of Judge Youngdahl. We now refer to some of the pertinent portions of the transcript. When the witness Gross was testifying before the jury we find the following (Page 690, Transcript of Proceedings, April 23, 1964):

"BY MR. LAUGHLIN:

Q Now at that time, Mrs. Gross, you were nervous and upset, weren't you?

A Very much so.

Q And you were afraid of being indicted for perjury?

A Yes, I was.

Q And you did not want to be indicted for perjury, did you?

A No, sir.

Q And then you were hoping that arrangements could be made where you would not be indicted for perjury; is that right?

A What sort of arrangements are you talking about?

Q In other words, you were expecting to cooperate and therefore escape an indictment for perjury; isn't that right?

A I was looking out for myself at that time; yes, sir.

Q And you felt you had to cooperate with Mr. Sullivan and Mr. Hannon; is that right?

A Yes, sir.

Q And therefore on that account of course you were expecting some measure of leniency; weren't you?

A I was hoping."

We have, of course, contended in season and out of season there was absolutely no theory upon which the recordings could have been admitted in evidence. If we refer to it again it will only be to emphasize what was said by Judge Youngdahl in Criminal Case No. 599-63 and we ask this Court to read Pages 344 to 346 Volume V of Transcript of Proceedings before Judge Youngdahl, October 8, 1963, which is a part of the record in the case. At Page 344 Judge Youngdahl said the following:

"The Supreme Court has held unanimously that 47 U.S.C. Section 605 'Contemplates voluntary consent and not enforced agreement to publication'. Weiss v. United States, 308 U.S. 321, 330 (1939).

"This Court has concluded that the Weiss case is dispositive of the issue in the present case, and requires the exclusion of the tapes on the ground that Mrs. Gross' consent was not voluntary. * * * There was a clear 'hope of leniency,' Supra, in Mrs. Gross' mind, which hope was deliberately created by the implied promises of both Mr. Sullivan and the Deputy Foreman. Her consent, under the implied threat of being indicted if she did not cooperate and under the implied promise that she would not be indicted if she did cooperate, is not the kind of 'authorization' contemplated by 47 U.S.C. Section 605 as Weiss makes abundantly clear. * * *." (Underlining ours)

The record clearly shows that the witness Gross at no time testified that the appellant Laughlin turned any money over to her. The witness Smith said she had had no contact with the appellant Laughlin. During the course of the argument on October 16th, counsel for the Government intimated that the appellant Laughlin had something to do with the passing of money. Of course that is untrue. Undoubtedly Mr. Acheson had received that information from Mr. Sullivan, Mr. Hannon and Mr. Lowther. It is plain they tried and tried, without success, to induce the witness Gross to say that the appellant Laughlin had had some money transactions with her and no matter how hard they tried, and no matter how many promises they made to her, at no time could they induce her to make such a statement. It must not be overlooked that the witness Gross had been a member of the police force in Baltimore for many years and was attached to the Abortion Squad until she was relieved from duty for misconduct. She also knew the appellant Forte in Baltimore. As to transactions taking place between Gross and Forte, appellant Laughlin had no knowledge.

In the first appearance of Mrs. Gross before the Grand Jury she stated that she did not know appellant Laughlin and had no transactions of any kind with him. Therefore, there looms large in this case the tactics pursued by the

United States Attorney's office after her first appearance before the Grand Jury. In our original brief we said that there perhaps was never another case comparable to this one. Mrs. Gross was virtually forced to go to Mr. Hannon's office and for a period of about $2\frac{1}{2}$ hours she was subjected to an intense grilling. It was made plain to her also that she was subject to indictment. She was virtually promised that if she would give testimony desired by Mr. Hannon, Mr. Sullivan and Mr. Lowther, that she would escape an indictment. The transcript of this grilling in Mr. Hannon's office is a part of the record in this case. It will be recalled that during the argument Mr. Acheson optimistically referred to this document as a "conference transcript". At the time of the grilling administered to Mrs. Gross by Mr. Hannon and Mr. Sullivan, in Mr. Hannon's office, said transcript being optimistically referred to by Mr. Acheson as the "conference transcript", certain responses were elicited and this is found at Page 41 of Appellee's Brief. What was quoted, standing alone, would not correctly depict the true situation. As Appellee's Brief itself sets forth at Pages 42, 43 and 44 in quoting what occurred during the second appearance of Mrs. Gross before the Grand Jury on March 1, 1963, meaningful consent was lacking. There we also find the quoted statements of Mr. Sullivan and the Deputy Foreman of the Grand Jury with respect to the "big fish" and "little fish" which caused Judge Youngdahl to say: (Transcript of Proceedings, Criminal No. 599, 1963, October 8, 1963):

"* * * but I will admit to you, frankly, I was shocked when I read the testimony for the first time of the Deputy Foreman of the Grand Jury and of Mr. Sullivan."

At the time of argument, statement was made that we would try to condense the Grand Jury proceedings, made a part of the record in this case, to assist the Court. However, in examining the various transcripts it is very difficult to do this, and we ask the Court to read this in its entirety. In our

judgment a careful reading of the Grand Jury proceedings, first appearance of Mrs. Gross on March 1, 1963; interrogation of Mrs. Gross in Mr. Hannon's office on March 1, 1963, referred to by Mr. Acheson as a "conference transcript"; second appearance of Mrs. Gross before the Grand Jury on March 1, 1963; appearance of Mrs. Gross before the Grand Jury on March 18, 1963, and the three appearances of Officer Wallace before the Grand Jury would lead one to inquire whether the investigation was in truth and in fact a good faith effort to ascertain all information with respect to the allegations leading to the impaneling of the Grand Jury or whether or not there was a desire to involve another person or persons as a result of the dissatisfaction felt by the United States Attorney's office brought about by the jury's verdict in United States v. Forte in the courtroom of Judge Tamm in Criminal Case No. 741-61 on February 20, 1963. It is also important in our judgment for the Court to read the transcript of testimony of Mrs. Gross before the Grand Jury in March of 1964. It is also important in our opinion for the Court to read the very brief transcript, December 10, 1963, before Chief Judge McGuire. At that time the United States Attorney's office informed Judge McGuire that they were going to appeal from Judge Curran's ruling.

The witness Gross appeared for the third time before the Grand Jury on March 18, 1963. From the time of her first appearance before the Grand Jury on March 1st up to the time of this third appearance on March 18th she had not only been threatened and badgered by Mr. Sullivan, Mr. Hannon and Mr. Lowther, as well as Sergeant Wallace, but had been contacted on the telephone by Mr. Sullivan, Mr. Lowther, Mr. Hannon and Sgt. Wallace. At Page 140 (third appearance before Grand Jury, March 18, 1963) the following occurred:

"BY MR. SULLIVAN:

Q In those conversations was there any indication that you would not be taken care of at the end of the trial?

A Never, never. I mean Laughlin never mentioned money to me at all."

At this point it may be well to refer to the testimony of Assistant United States Attorney Sullivan in the courtroom of Judge Youngdahl on October 2, 1963, Criminal Case No. 599-63, at Page 66. Sullivan, under oath, said this in referring to the witness Gross (Recross-Examination of Mr. Sullivan by appellant Laughlin):

"MR. SULLIVAN: I explained she could very well be indicted herself for her participation, along with you and Dr. Forte, in the obstruction of justice in the Smith case, because she, in fact, according to the evidence before me, had taken money and instructions from you, * * *."

This statement made by Mr. Sullivan under oath was false and known to him to be false.

In connection with our point on the use of the Grand Jury for discovery purposes, we refer to Norcross v. United States, 209 Fed. 13 where it was held that the court will not assist the Grand Jury in securing evidence against persons already indicted. See also In Re National Window Glass Workers, 287 Federal 219.

It is interesting to note the contention made in Appellee's Brief that the term used by Mr. Sullivan, "in the switches", could conceivably be an innocent term. Reference is made in Footnote 25, Page 39 of Appellee's Brief, to an apparent explanation. This explanation is humorous. To the average person the expression, "you are in the switches", would denote that the person is in serious difficulty and of course the witness Gross realized she was in serious difficulty. Again at the bottom of Page 8 and top of Page 9 (Interrogation of Mrs. Gross in Mr. Hannon's office, March 1, 1963) we find this expression used by Mr. Hannon as follows:

"MR. HANNON: Mr. Sullivan has indicated it is your choice. If you want to talk to a lawyer you are free to talk to the lawyer. I think that in your experience -- you're an experienced policewoman, aren't you? I would say you're in the switches." (Underlining ours)

This second statement of course completely demolishes the argument by the United States Attorney made on October 16th when he inferred the witness Gross, having served on the police force, would not have been influenced by any statement by Hannon, Sullivan or Lowther. There isn't the slightest doubt that Mrs. Gross, having served on the police force in Baltimore for years, and particularly having served on the Abortion Squad and having participated in many, many arrests, fully understood what was meant by the statement: "You are in the switches". It simply meant this. Mrs. Gross had committed perjury on top of perjury. She was in danger of indictment and in fact knew she would be indicted if she did not cooperate with the United States Attorney's office, and by cooperating leniency would be shown. And the promise of leniency was uppermost in her mind and of course it was with the expectation of leniency that she agreed to make the recordings in violation of the Federal Communications Act.

We believe, also, that the facts of this case would come under State v. Cory 382 Pac(2) 1019. While of course State v. Cory had to do with interference with relationship of attorney and client, we believe it has application here for the reason that Mrs. Gross was by her own testimony in contact with appellant Laughlin, and was of course in contact with appellant Forte inasmuch as both of them lived in Baltimore. It would be assumed, therefore, if difficulty would arise she would contact appellant Laughlin as counsel. When we have in mind, therefore, the statements made by her in the recordings: "I may need a lawyer" and "If I need a lawyer I don't want you", it is evident that these statements were suggested to her by Hannon, Sullivan and Wallace. In view of this, we believe that State v. Cory, supra, is appropriate here.

In connection with the contention made by the Assistant United States Attorney in his brief to the effect that appellant Laughlin could again be indicted, we desire to state that we have read those cases and they have no application here. The facts are entirely different. In any event, in those cases the Government had no opportunity to appeal or, in fact, did not appeal. In the instant case the Government utilized its right to appeal and then abandoned it. A reading therefore of the cases cited by the appellee: Nolan v. US, 163 F(2) 768; Robinson v. United States, 284 F(2)775; Amrine v. Tines, 131 F(2) 827, have no application here.

It will be seen that the charge as to the law of conspiracy was not only wholly inadequate but decidedly and distinctly prejudicial. The trial judge was aiming for a conviction and did a thorough job of misleading the jury. At Page 53 to 58 when the trial judge would correctly cover some point of the law, he would almost immediately dilute it with a statement prejudicial to the defendants. For instance at Pages 56 and 57 when he told the jury that the appellant Laughlin had the duty to properly investigate the case, he immediately followed it with:

"However a lawyer representing a client in a pending case before the court does not have the right to conspire with anyone to influence a witness not to give testimony in a pending case or to influence a witness to testify falsely in a case".

There was absolutely no evidence to show that appellant Laughlin had done either.

It must not be overlooked that the law is clear that before the hearsay declarations of a co-conspirator are admissible, there must be independent evidence establishing a defendant's participation in the conspiracy before such declarations are admissible. Glasser v. United States, 315 US 60, 70-74, and the more recent case of US v. Bentvena, 319 F(2) 916. A defendant's "participation in the conspiracy....can be established only by proof, properly admitted

into evidence of their own words and deeds", United States v. Russano, 257 F(2) 712. Such independent proof must be substantial and not "too slight", United States v. Consolidated Laundries Corp., 291 F(2) 563, United States v. Stromberg, 268 F(2) 256.

In this case there was no independent evidence. The case depended entirely on Gross. Of course it is plain that the testimony of Gross by means of the tape recordings was not admissible on any theory. The recordings were made after the termination of conspiracy. See Logan v. United States, 144 US 263. See also the old case in this jurisdiction, United States v. White, Cranch CCDC Vol. 5 (1836):

"The court will not permit the declarations of another defendant...such declarations having been made after the supposed accomplishment of the common purpose".

See also Greenleaf on Evidence 16th Ed. Section 184(a). See also Gunnell v. United States, 16 DC Reports 196; 5 Mackey 196.

As to the recordings, the trial judge said (JA 61):

"....this evidence may be considered against the defendant Laughlin only, and then only for the purpose of connecting Laughlin with the conspiracy...."

Of course by no stretch of the imagination could this be considered a correct statement of the law.

As to the recordings, the trial judge said:

"Further, I instruct you that this particular evidence is not to be considered on the question of whether or not the conspiracy existed but only as bearing on the question of whether the defendant Laughlin was a part of the conspiracy that may have previously existed as alleged in the indictment if you find from other evidence adduced in the case that such conspiracy in fact existed".

Needless to say, this is not the law. In his charge the trial judge did not outline to the jury the law as the law exists but he gave to the jury the law as he (the trial judge) wants it to be. Of course when a trial judge wholly

and completely and with reckless abandon disregards the law as announced by this Court and the Supreme Court of the United States, then we are on very dangerous ground indeed. In fact it will be seen that at Page 68 (JA) the trial judge was told that he had disregarded the law as announced by the Supreme Court of the United States. If we may refer again to the witness Gross, we contend that even her testimony on the stand can be regarded as a post-conspiracy declaration and hence not admissible at all. While perhaps most of the cases hold that the law applies to a written confession and not to testimony on the stand, we believe this case is different. Gross testified before the grand jury under oath. The United States Attorney's Office was not satisfied with her testimony and she was then grilled for two and a half hours and threatened with perjury if she did not cooperate (which meant giving false testimony). She then agreed to give false testimony to satisfy Mr. Sullivan, Mr. Lowther and Mr. Hannon. We contend therefore it was in fact a post-conspiracy declaration and hence not admissible.

In United States v. Charles, 2 Cranch CC 76; 2 DC 76, Federal Cases 14786 we find:

"A confession made under the influence of hope or fear cannot be given in evidence".

There is a very fine statement in 52 Michigan Law Review, page 1173, which in our opinion correctly sums up post-conspiracy declarations:

"Declarations made after the conspiracy ends are particularly untrustworthy. Once the conspiracy terminates the interest of every member is to avoid responsibility and shift the blame. What he says about himself may well be true and is at any rate against his own interest. But what he says about others may be based on spite, fear, pique, malice, a desire to stand well with the prosecutor or many other motives not leading to truth".

The trial judge was asked to instruct the jury that mere suspicious circumstances are not sufficient to overcome the presumption of innocence. This was refused. In Hash v. State, 59 Pac(2) 305, it was held that a refusal of such an instruction was reversible error.

The charge to the jury was erroneous.

In defining reasonable doubt, the court said:

"But, if after such impartial comparison and consideration of all the evidence, and giving due consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendants you can truthfully say that you have an abiding conviction of the defendants' or either of their guilt, such as you would be willing to act upon in the more weighty and important affairs, then as to such defendant or defendants you have no reasonable doubt".

This is in error. It should be:

"such a doubt as would cause reasonable men to hesitate to act upon"

See Bishop v. U.S., 71 US Appeals DC 138, and the very recent case of Jones v. U.S. et al, Nos. 18410, 18411 (decided October 15, 1964).

The part of the charge dealing with accomplice testimony was fatally defective inasmuch as there was no corroboration.

It is true that the jury was told that the testimony of an admitted perjurer should be considered with caution and weighed with care. However in view of the circumstances of the case and the fact that the witness Gross had committed perhaps 50 to 60 acts of perjury we believe the court should have instructed the jury to disregard the whole of her testimony as unworthy of belief. See Arbuckle v. United States, 79 US Appeals DC 282. In the charge at Page 53 of the Joint Appendix the jury was told that the appellants were charged among other things of inducing the complaining witness to "testify falsely". There was no such evidence in the case.

Bias of the Grand Jury

In our brief we have already referred to the bias of the grand jury. We state again this not only justifies reversal but requires dismissal of the indictment. We believe the following additional authorities will be helpful. In Harper v. State, 151 Sou(2) 881, we find:

"A prosecutor may not do indirectly what he may not do directly".

In People v. McHigh, 247 NYS(2) 839:

"The district attorney should avoid the practice of making himself unsworn witness and arguing his veracity and that of police as issues".

See also People v. Tassiello, 91 NE(2) 872.
People v. Lovello, 136 NE(2) 483.

The following from 24 Michigan Law Review 318 at 328 is helpful:

"Today the grand jury may well be in given circumstances the skirt behind which an overzealous or malicious or even corrupt prosecutor may hide to destroy the accused in the white hot light of public accusation, without merit, and without fear of retribution in the form of a suit for malicious prosecution".

See also United States v. Kilpatrick, 15 Federal 765.

We believe one of the most flagrant examples of the prejudice of the trial judge and the misconduct of the United States Attorney's office is reflected in the playing of the recordings during final argument. While we have referred to this in our original brief, we state that this clearly indicated that the trial judge and the Assistant United States Attorney were friendly confederates. The playing of these recordings during final argument was such a departure from the ordinary course of judicial proceedings as to call for this Court's power of supervision. In our judgment the trial judge had to know about this because no Assistant United States Attorney would attempt such a practice without getting permission of the trial judge. In

the first place the recordings were not admissible under any theory and playing them before the jury and again during final argument compounded the error. It is our hope that the Court in its opinion will deal with this drastic departure from fundamental fairness. We refer to the words of Mr. Justice Murphy in dissenting in Fisher v. Pace, 336 U.S. 155:

"An appellate court can rarely correct abuse such as this. 'If the judge intends to be unfair, the trial will be a farce no matter how many detailed rules we provide for him'. McElroy, Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Model Code of Evidence, Model Code of Evidence, pp. 356, 358."

Continuing, Mr. Justice Murphy said:

"A printed record cannot reveal inflections and gestures, the tenor of a judge's conduct of a trial -- matters which make his position the most responsible in the daily administration of a fair judicial system. See Rheinstein, Who Watches the Watchmen? in Interpretations of Modern Legal Philosophies (New York, 1947), p. 589. In recent years we have seen a pronounced tendency to leave many matters in the discretion of the trial judge. McElroy, supra; Yankwich, Increasing Judicial Discretion in Criminal Proceedings, 1 F.R.D. 746. The movement, which rests on the assumption that the judge is wise and impartial, should make us quick to upset his determinations in the few cases which clearly demonstrate light regard for the principles that should guide a responsible jurist."

See also Viereck v. United States, 318 U.S. 236.

Instructions

With respect to the instructions, we believe that all of the instructions tendered correctly stated the law. These are found at pages 38 through 45 of the Joint Appendix. Insofar as the allegation of conspiracy is concerned, we say that there was a duty on the part of the trial judge to grant tendered instructions numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, and 17 in that what was contained therein correctly stated the law as to conspiracy. We say, also, that our tendered instruction numbered 19 was entirely proper, and it will be seen that it was reluctantly granted but the trial judge diluted the

efficacy of it by adding the following words: "A lawyer representing a client in a case pending before the Court does not have the right to conspire with anyone to influence a witness not to give testimony in a pending case or to influence a witness to testify falsely in a case".

Adding these words conclusively showed animus, bias and hostility on the part of the trial judge and made him a friendly confederate with the United States Attorney.

We contend that we were entitled to instruction numbered 20 as well as 21 to 27. We contend, also, that we were particularly entitled to tendered instruction numbered 28. This had to do with the recordings and the interception of telephonic messages to appellant Laughlin. Therefore, the jury had a right to consider whether under the circumstances of the case there was a proper consent and whether it was voluntarily given and was a meaningful consent. We contend we were also entitled to tendered prayer numbered 29. This had to do with the duty on the part of the United States Attorney's office to call Officer Wallace. Wallace was a target of investigation. He had been accused of soliciting a bribe. Therefore, the United States Attorney's office was derelict in its duty to the public in not properly investigating this allegation. Not only did they not investigate it but they permitted Wallace to take over the investigation and to appear behind the scenes, coaching and intimidating witnesses. Under the cases cited in Point IX of our Brief we would have the right to explore that and there was a duty on the part of the Government to call this witness.

As to tendered prayer numbered 31, we believe little argument will be necessary to show that we were entitled to this instruction and we make particular reference to the case of State v. Walker, 166 A2d 567.

CONCLUSION

We believe our original brief fully covered the many points involved in the case clearly demonstrating, in our judgment, the unfairness of the trial and the bias and hostility of the trial judge. It is noted that the brief filed by the appellee did not touch upon many of our points such as the bias of the judge and the inadequacy of the instructions and the failure of the trial judge to give to the jury instructions tendered correctly stating the law. In addition to this, the Government did not answer our point as to the prejudice resulting when the recordings were played during final argument.

We have endeavored in this reply brief to answer in our judgment the points requiring answer. We believe that our brief and the reply brief clearly demonstrate that the trial was not a trial at all but was a virtual miscarriage of justice. We realize that a reversal ordinarily calls for a new trial. In view of the fact that unlawful evidence was offered to the Grand Jury and due to the fact that the Grand Jury was biased, it is our opinion that under the rulings of this Court the mandate of this Court should also call for the dismissal of the indictment.

James J. Laughlin
James J. Laughlin
National Press Building
Washington, D. C.
Counsel for Appellants